Neutral Citation Number: [2022] EWHC 2234 (Comm)

Case No: CL-2020-159 AND 171

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (KBD)**

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

Date: 03/10/2022

**Before** :

**HIS HONOUR JUDGE PELLING KC**
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between:**

**TRAFIGURA MARITIME LOGISTICS PTE LTD**

**Claimant**

**- and –**
**CLEARLAKE SHIPPING PTE LTD**

**Defendant**

**And Between:**

**(1) CLEARLAKE CHARTERING USA INC**
**(2) CLEARLAKE SHIPPING PTE LTD**

**Claimants**

**- and -**
**PETROLEO BRASILEIRO SA**

**Defendant**

**MICHAEL ASHCROFT KC and DANIEL BOVENSIEPEN** (instructed by **Schjødt LLP**) for the **Claimant in the 159 Claim**
**ROBERT THOMAS KC and BEN GARDNER** (instructed by **Kennedys Law LLP**) for the **Defendant in the 159 Claim** and the **Claimants in the 171 Claim**
**HENRY BYAM-COOK KC** (instructed by **White & Case LLP**) for the **Defendant in the 171 Claim**

Hearing dates: 4,5,6, 7 and 11 July 2022

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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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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

## HH Judge Pelling KC:

## Introduction

1. This is the trial of a claim by the claimant in the 159 Claim ("Trafigura") made under a maritime indemnity given by the defendant in the 159 Claim ("CSPL") by reference to a voyage charter by Trafigura to the first claimant in the 171 Claim ("CUSA") of the MT Miracle Hope ("Vessel") in order to secure the discharge of the Vessel's cargo without presentation of the original Bills of Lading. It is also the trial of a claim under a maritime indemnity given by the defendant in the 171 Claim ("PBSA") to CUSA in respect of a sub charter of the Vessel by CUSA to PBSA for the same purpose.

2. As is well known, a ship owner or disponent owner can be liable for mis-delivery if a cargo is delivered to a receiver other than on presentation of the original bills of lading. Where such a claim is made, a claimant can commence proceedings for the arrest of the vessel as security for the claim. Where that happens, typically it is necessary for security to be provided by or on behalf of the owner before the vessel concerned can be released from arrest.

3. Bills of Lading are often negotiable and, in many cases, particularly in the liquid hydrocarbon trade, the original bills of lading may not be available to the receiver at the discharge port on arrival of the vessel. In order to avoid the costs of delay in discharge, the practice is for the receiver to tender a letter of indemnity to the owner or disponent owner of the vessel in order to secure release of the cargo. Where the vessel has been sub-chartered, there will be back to back letters of indemnity from the disponent owner up the charter chain to the head owner so as to enable any mis-delivery related claims to be passed up and down the charter chain. Such letters of indemnity typically indemnify the owner or disponent owner in respect of any claim against it for mis-delivery, for the costs of providing security in order to obtain the release of an arrested vessel and also to fund any consequential legal action including defence costs. Many standard form charterparties require owners to discharge against a letter of indemnity, or a deemed indemnity in terms set out in the charterparty, if requested to do so. If it should turn out that the receiver was not entitled to release of the cargo, then the owner will be liable to the holder of the original bills of lading but is entitled to be indemnified in respect of that liability to the extent permitted by the terms of the letter of indemnity concerned. Letters of indemnity are free standing contracts between the indemnified and the indemnifier - see The Songa Winds [2018] EWCA Civ 1901; [2018] 2 Lloyds Rep 374 - that are frequently subject to exclusive jurisdiction provisions that differ from those in the host charterparty.

4. Almost invariably, liability under maritime letters of indemnity is not secured, although it can be and sometimes is. By accepting an unsecured letter of indemnity the owner or disponent owner is exposed to the risk that the letter of indemnity will not be honoured and may have to commence either proceedings in a state court (as in these claims) or an arbitration (as in the case of the claim by the head owner against Trafigura arising out of the same facts as these claims) to recover what is due. It is also relevant to note that a requirement that an owner discharge without the benefit of an indemnity and without sight of the original bills of lading would require the owner to take the risk of a claim for mis-delivery that could be avoided by the simple expedient of refusing to deliver without sight of the original bills of lading and claiming demurrage for any

resulting delay in discharge. That is not a risk that a ship owner or disponent owner could reasonably be expected to take.

5. As will be apparent from what I have said so far, the efficient conduct of, in particular, the liquid hydrocarbon sea transport trade depends on the willingness of receivers to offer indemnities as the price of obtaining discharge without presenting the original bills of lading, and on ship owners being willing to discharge in such circumstances in return for such indemnities. As is obvious that willingness depends ultimately on owners being confident that the indemnities that are offered will be honoured. It is this willingness that eliminates both the delay and cost of refusing to discharge without sight of the original bills.

6. Paragraphs 2-5 above set out in summary the context in which the construction issues to which I turn below must be determined.

7. Frequently the purchase of a large volume high value cargo will be financed by borrowing by the purchaser from a trade finance bank, usually in the expectation that the cargo will be sold on prior to discharge. The purchase price payable as a result of such an onward sale will be paid into the original purchaser's account with the trade finance bank and that purchaser will be entitled to the margin between the purchase and sale price less any banking fees and costs, or be liable for any shortfall. Whilst the methods used for delivering finance of this sort vary, it will commonly involve the trade finance bank issuing an irrevocable letter of credit naming the original purchaser as applicant and the original seller as beneficiary, with the trade finance bank being secured by the original bills of lading being issued or endorsed to the order of the trade finance bank. Typically, the trade finance bank will then hold the bills of lading as security to ensure the original purchaser repays the sum borrowed to fund the original purchase from the date when payment is made against the irrevocable letter of credit. Generally no problems arise in practice, at any rate where there is a rising market for the cargo during the period of transportation or where the purchaser is otherwise ready, willing and able to meet its liabilities.

8. In this case as in many others there is a chain of charters stretching from the head owner to the sub-charterer. Trafigura was the time charterer of the Vessel from the head owners. It let the Vessel under a voyage charter to CUSA. CUSA then chartered the Vessel to PBSA. Both the voyage charter to CUSA and the sub charter by CUSA were fixed on 21 August 2019 on amended Shellvoy 6 forms in materially similar terms.

9. When the Vessel arrived at the discharge port, the original bills of lading were not presented by the receiver. The receiver (the purchaser of the cargo from Petrobras Global Trading BV ("PGT"), a subsidiary of PBSA) had sought discharge without presentation and orders to that effect had been provided to the master of the Vessel on the basis that PBSA as sub charterer would provide an Indemnity to CUSA. CSPL provided an indemnity up the charter chain to Trafigura, although as I have explained it was CUSA not CSPL that had chartered the Vessel from Trafigura.

10. As I explain in more detail below, subsequently, the Vessel was arrested following the commencement of proceedings in Singapore by the Singapore Branch of Natixis Bank ("Natixis"), on the basis that Natixis had financed the purchase of the cargo by the receiver from PGT, it was the lawful holder of the original bills of lading, and in

consequence the cargo had been wrongly delivered to the receiver. Following the arrest of the Vessel, claims for indemnity (including security sufficient to enable the Vessel to be released from arrest) were made down the chain of indemnities but no indemnity was forthcoming up the chain. That resulted in the commencement of an arbitration by the head owner against Trafigura, the 159 Claim by Trafigura against CSPL under the indemnity allegedly provided by it to Trafigura, and the 171 Claim by CUSA and CSPL against PBSA under the indemnity allegedly provided to CUSA by PBSA. PBSA maintains that even if CSPL is liable to Trafigura, it is not liable to either CUSA or CSPL because CUSA has no liability to Trafigura under any indemnity and PBSA has no contract with CSPL. I refer to this issue below as the "*Contractual Lacuna Issue*".

## The Facts

11. By a voyage charter by a fixture recap dated 21 August 2019, Trafigura chartered the Vessel to CUSA to carry a cargo of crude oil from up to 2 ports on a defined part of the Brazilian Seaboard to up to 3 ports in the Far East (the "Trafigura Charter"). On the same date CUSA sub-chartered the Vessel to PBSA. Both the voyage charter to CUSA and the sub charter by CUSA incorporated an amended version of the Shellvoy 6 voyage charterparty form provided by or on behalf of PBSA. The relevant provision within each is clause 33(6), which had been amended in materially identical terms. The drafting of the amendments was defective in a number of respects. I turn to the issues that arise in more detail after completing a description of the relevant background.

12. On 2 September 2019, PGT sold 1 odd million barrels of crude oil to Hontop Energy (Singapore) Pte Ltd ("Hontop"), DES Qingdao in China. Hontop financed the purchase by borrowing from Natixis, which, on 25 October 2019, issued an irrevocable letter of credit naming PGT as beneficiary and providing for payment against various documents to be presented by PGT including a " … *full set of 3/3 original clean on board bills of lading issued or endorsed to the order of Natixis, Singapore* …". It provided in the alternative for the provision of a letter of indemnity in a specified wording, the relevant part of which I set out below.

13. Two parcels of crude oil were loaded onto the Vessel. The parcel with which this claim is concerned consisted of just over 1.001m barrels loaded aboard the Vessel on 17 September 2019, which was the subject of Bills of Lading 2A, 2B, 2C and 2D, each issued on 11 October 2019, under which PBSA was named as shipper.

14. By an email dated 14 October 2019 (after the date when the Voyage charter and the sub-charter had become unconditionally binding) Clearlake (it is unclear what entity within the Group) requested of Trafigura:

> "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 I explain below, the terms of the voyage and sub charters had called for the supply of the wording prior to each becoming unconditionally binding, but that wording had not been sought by or supplied either to CUSA by Trafigura, or by CUSA to PBSA, prior to the voyage and sub charters becoming unconditional. In response to the 14 October request, Trafigura provided on the same day (see the email from Mr Sangwan

to Clearlake "Operations" at 06.13) a copy of the International Group of P&I Clubs Group C wording in the following terms:

> "STANDARD FORM LETTER OF INDEMNITY 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
>
> To: [*insert name of Owners]* *[Insert date]*
>
> The Owners of the [*insert name of ship]*
>
> [*insert address*]
>
> Dear Sirs
>
> Ship: [*insert name of ship*]
>
> Voyage: [*insert load and discharge ports as stated in the bill of lading*]
>
> Cargo: [*insert description of cargo*]
>
> Bill of lading: [*insert identification number, date and place of issue*]
>
> The above cargo was shipped on the above vessel by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bills of lading are made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bills of lading*] but we, [*insert name of party requesting substituted delivery*], hereby request you to order the vessel to proceed to and deliver the said cargo at *[insert name of substitute Port or Place of delivery*] to *["X [name of the specific party] or to such party as you believe to be or to represent X or to be acting on behalf of X"]* without production of the original bill of lading.
>
> In consideration of your 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 interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.
>
> ..."

Mr Thomas KC, who appears on behalf of CSPL and CUSA, told me in the course of his submissions and it does not appear to be in dispute that the 13 biggest P&I Clubs in the world, which together cover 90% of the world's merchant vessels, are members of the International Group and adopt standard wording promulgated by that group. The wording referred to above was such standard wording. Mr Thomas also told me, and again it does not appear to be in dispute, that the International Group standard wording for an LOI only in respect of delivery without presentation of original bills of lading is in materially identical terms to the wording set out in paragraphs 1-3 of the Group C wording set out above.

15. Thereafter there was significant email traffic between the various parties and the Vessel concerning the appointment of agents at the discharge port, and thereafter with the prospects for obtaining a discharge berth and other port information. This detail is not material for present purposes.

16. On 28 October 2019, Hontop sent discharge orders in respect of the cargo, identifying the discharge port as Qingdao and identifying Hontop as the receiver. Hontop nominated its own agent for the discharge. Ultimately PBSA gave instructions to discharge in terms that included the following:

> "… 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. ..."

The commercially absurd suggestion that the cargo be discharged without either presentation of the bills of lading or the provision of an indemnity was not made, nor was it suggested that such was the effect of the sub charter between PBSA and CUSA. Those instructions were forwarded up the charter chain and to the Master of the Vessel,

who confirmed receipt and that the Vessel would "*... perform accordingly*". PBSA maintain, passing on an argument made by Natixis in the Singapore proceedings, that the instruction to discharge the cargo was not an instruction to deliver the cargo to anyone, and in particular not Hontop, but only to discharge the cargo from the Vessel. No attempt had been made to explain in the discharge instructions how a cargo of over 1 million barrels of crude oil was to be discharged without it being delivered, or who was to meet the costs of that operation, assuming it was physically possible. Leaving to one side PBSA's point that no indemnity contract was concluded, or concluded on the terms relied on by Trafigura, there is nothing within the terms of the indemnity wording that suggest it was contemplated that there would be a discharge but not a delivery, nor that the LOI wording would apply only to discharge but not delivery. To the contrary the LOI wording expressly refers to delivery. If the intention had been that owners were to retain possession of the cargo after discharge, it is unclear what the purpose of invoking clause 33(6) was thought to be, or who was to meet the costs of this exercise.

17. The Vessel arrived at the discharge port on 31 October 2019, and tendered Notice of Readiness to discharge. On the same day, the vendor, PGT, issued a letter of indemnity to Natixis under the irrevocable letter of credit, using the language mandated by it, in these terms:

> "WE REFER TO A CARGO OF 981,616.383 NET BARRELS OF LULA CRUDE OIL DISCHARGED AT ONE OR MORE SAFE PORT(S), CHINA BY THE VESSEL MIRACLE HOPE ON DATED 31.10.2019, IN ACCORDANCE TO OUR SALES CONTRACT REF.792340 DATED 02.09.2019 (HEREINAFTER THE 'CONTRACT').
>
> ALTHOUGH WE HAVE SOLD AND TRANSFERRED TITLE TO THE ABOVE-NAMED CARGO TO YOU, WE HAVE BEEN UNABLE TO PROVIDE TO YOU THE FULL SET OF 3/3 ORIGINAL CLEAN ON BOARD BILLS OF LADING AND OTHER SHIPPING DOCUMENTS REQUIRED UNDER THE CONTRACT (THE "DOCUMENTS").
>
> IN CONSIDERATION OF YOUR MAKING PROVISIONAL PAYMENT OF U.S. DOLLARS 63,760,892.16 FOR THE AFOREMENTIONED CARGO, WE HEREBY EXPRESSLY REPRESENT AND WARRANT THAT IMMEDIATELY PRIOR TO THE TRANSFER OF THE ABOVE MENTIONED CARGO TO YOU, WE HAD MARKETABLE TITLE TO SUCH CARGO FREE AND CLEAR OF ANY LIEN OR ENCUMBRANCE AND WE HAD THE FULL RIGHT AND AUTHORITY TO TRANSFER AND EFFECT DELIVERY OF SUCH CARGO TO YOU.
>
> WE FURTHER AGREE TO MAKE ALL REASONABLE EFFORTS TO OBTAIN AND SURRENDER THE DOCUMENTS TO YOU AS SOON AS POSSIBLE AND TO INDEMNIFY AND HOLD YOU HARMLESS FROM AND

> AGAINST ANY AND ALL CLAIMS, DAMAGES, COSTS, AND EXPENSES INCLUDING REASONABLE ATTORNEY FEES, WHICH YOU MAY SUFFER BY OUR FAILURE TO PRESENT THE DOCUMENTS TO YOU OR BREACH OF THE WARRANTIES GIVEN ABOVE, INCLUDING BUT NOT LIMITED TO CLAIMS WHICH MAY BE MADE BY THE CARRIER, VESSEL OWNER, CONSIGNOR, CONSIGNEE OR ANY HOLDER OR TRANSFEREE OF THE DOCUMENTS OR BY ANY OTHER PARTY CLAIMING AN INTEREST IN OR LIEN ON THE CARGO OR PROCEEDS THEREOF, PROVIDED THAT (1) THE TOTAL AMOUNT FOR WHICH WE WILL BE LIABLE UNDER THIS LETTER OF INDEMNITY SHALL NOT EXCEED THE LESSER OF (A) THE TOTAL AMOUNT STATED IN THE FINAL COMMERCIAL INVOICE PROVIDED TO YOU UNDER THE CONTRACT, AND (B) THE TOTAL AMOUNT PAID TO AND RECEIVED BY US UNDER THE CONTRACT, AND (2) UNDER NO CIRCUMSTANCES SHALL WE BE LIABLE FOR ANY COST AND DAMAGES WHETHER INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL. … ”

There then followed two weeks of delay at the discharge port, apparently due to port congestion. Ultimately, the Vessel docked on 13 November and discharge and delivery to Hontop was completed on 16 November without presentation of the original bills of lading. The Vessel departed the discharge port on the evening of 16 November. No objection was taken at the time to the fact that the cargo had been delivered to Hontop.

18. Shortly thereafter, on or about 2 December 2019, it was agreed between Trafigura, CUSA and CSPL that the Trafigura Charter for the Vessel (which it will be recalled had been entered into between CUSA and Trafigura) would be “*amended*” (but in reality, as I explain below, novated) so that the Charterer became CSPL. This arrangement is evidenced by an email of that date from Mr MacLeod of Clearlake to Mr Mandius of Trafigura in these terms:

> “TO : TRAFIGURA
>
> ATTN : LUDVIG
>
> FROM : GUNVOR / NICHOLAS
>
> **ADDENDUM NO.l **
>
> 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.
>
> END"

19. It is common ground that the effect of the written Addendum was to substitute CSPL for CUSA as charterer under the Trafigura Charter and that in consequence CSPL became liable for all past and future obligations and liabilities accrued by the charterer under the Trafigura Charter. However, CUSA remained the disponent owner to PBSA. It is this that enables PBSA to submit that it has no liability to CUSA because it, CUSA, no longer has any liability to Trafigura, and PBSA has and never has had any liability to (indeed any contract with) CSPL. It is alleged by CPSL that there was an internal implied indemnity in place under which CUSA agreed to indemnify CSPL in respect of any liabilities arising under indemnities given by CSPL in respect of vessels it chartered to CUSA. A Booking Note was drawn up on 15 April 2020 that purported to evidence an internal charter of the Vessel by CSPL to CUSA. In so far as is material it was in these terms:

> "MIRACLE HOPE / CCUSA : CP 21/08/19— BOOKING NOTE
>
> C/P DATED: 21 AUGUST 2019
>
> CHARTERER: CLEARLAKE CHARTERING USA INC.
>
> 600 TRAVIS STREET, SUITE 6500
>
> HOUSTON, TX, USA 77002
>
> +1-281-214-3107
>
> SHIPPINGOPS@CLEARLAKESHIPPING.COM
>
> OWNER: CLEARLAKE SHIPPING PTE LTD OF SINGAPORE."

As I explain further below, this document was prepared over a month after the Vessel had been arrested in Singapore, after these proceedings had been commenced by Trafigura, and just short of a month before the Vessel was released from arrest. There is no written evidence that contains or directly evidences the existence of the implied deemed indemnity relied on by CSPL.

20. On 4 March 2020, Natixis wrote to PBSA and its vendor subsidiary, PGT, demanding that they obtain and surrender or deliver the Bills of Lading to it by no later than 6pm Singapore time on 10 March 2020. On 7 March 2020, the Vessel left Taiwan for Singapore to take on fuel. On 10 March 2020, negotiations for a spot fixture of the Vessel by Trafigura to a third party were completed subject to various conditions. This is described as being an agreement on subjects. Although not obvious, this means that the agreement was conditional, and so not in fact an agreement at all unless and until the conditions were satisfied or waived – a process the parties describe as "*lifting the subjects*". This charter (known in these proceedings and referred to below as the "*P66 Fixture*") was for a voyage from a load port in West Africa to a discharge port on the west coast of the United States of America. It was considered one that provided a significant commercial advantage because it provided the possibility of an onward charter at a high charter hire rate with limited non-revenue earning movements. On 13 March 2020, the subjects to which the P66 Fixture had been subject were lifted and it became a binding charter. It provided for a Laycan (i.e. the date by which the Vessel was required to arrive at the load port in West Africa) of 4/5 April 2020.

21. Meanwhile, on 12 March 2020 the Vessel had docked in Singapore, where it was arrested by Natixis in *in rem* proceedings it had started in Singapore in which it alleged mis-delivery of the cargo by the head owners and demanded security in the sum of US$76,050,000 in return for the release of the Vessel from arrest. Each of the head owner, Trafigura, and Clearlake asserted down the charter chain that they were entitled to be indemnified by each charterer. No indemnity was forthcoming and on 18 March the P66 Fixture was cancelled because the Vessel was no longer able to make the Laycan by reason of its arrest.

22. These proceedings were commenced by Trafigura on 23 March 2020 and mandatory injunctions were sought by and granted to Trafigura against CSPL and to Clearlake against PBSA. The effect was to require respectively CSPL and PBSA to provide security to Natixis so as to secure the release of the Vessel, and to provide funds to enable the proceedings commenced by Natixis to be defended. A claim by the head owners for similar relief was commenced against Trafigura by arbitration. What then followed was significant delay in Singapore, caused by Natixis raising difficulties concerning the terms on which security was being offered. Ultimately orders were made in these proceedings requiring CSPL and PBSA to pay, or procure the payment of, the sum required to secure the release of the Vessel into court in Singapore by 11 May 2020. In the result PBSA paid the required sum into court in Singapore and the Vessel was released from arrest on 11 May 2020. Prior to that CSPL had borrowed the sum necessary for it to comply with the order made against it. In the end the sums borrowed were not required because the necessary security was provided by PBSA. CSPL claims the cost of borrowing from PBSA under the indemnity between CUSA and PBSA.

23. On the same day that the Vessel was released from arrest, Trafigura entered into a substitute voyage and storage charter with an associated company. This charter is known in these proceedings and referred to below as the "Traf CP". It commenced on 28 May for a voyage between Basrah in the Gulf and Asia. The agreed freight rate was "*5 days average TD3 BITR pricing 6-13 May 2020 minus WS3*". The charter provided for a storage period of up to 135 days at a rate of "*5 days average of TD3C pricing 22-26 June 2020*" for the first 45 days, and a fixed rate of US$33,000 per day for the remaining storage period. The Vessel arrived at the discharge port pursuant to the Traf

CP on 22 July and, apart from a short round trip for fuel replenishment between 10 and 13 September, was waiting to discharge until 27 October, when it commenced discharge. That was completed and the vessel left the discharge port on 1 November 2020.

24. Trafigura claims under the CSPL indemnity the loss of gross profit from the P66 Fixture, the gross profit it is alleged would have been made by the charter that it alleges would have followed ("the Follow On Fixture") and the expenses it incurred as result of the Vessel's arrest, less the profit made by it under the Traf CP. This claim is disputed by PBSA and CSPL for the detailed reasons I consider later in this judgment.

## The Charterparties

25. The voyage charterparty and the sub-charterparty were in materially identical terms. In so far as is material for present purposes, clause 33(6) of the voyage charter by Trafigura to CUSA and the sub-charter by CUSA to PBSA was in these terms:

> "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 caused 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 bill 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 unless before that time Charterers have received from Owners written notice that:

(a) some person is making a claim in connection with Owners delivering cargo pursuant to Charterers' request or

(b) legal proceedings have been commenced against Owners and/or carriers and/Charterers and/or any of their respective servants or agents and/or the vessel for the same reason.

When Charterers have received such a notice, then this indemnity shall continue in force until such claim or legal proceedings are settled. Termination of this indemnity shall not prejudice any legal rights a party may have outside this indemnity.

(vi) Owners shall promptly notify Charterers if any person (other than a person to whom Charterers ordered cargo to be delivered) claims to be entitled to such cargo and/or if the vessel or any other property belonging to Owners is arrested by reason of any such discharge of cargo.

(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 bold italicised words had been inserted into the draft and did not form part of the original form. As will be apparent from what is reproduced above, the form used contemplated (before it was amended) that where discharge without Bills of Lading was requested, then the owner or disponent owner would discharge in accordance with that request on the basis of a deemed indemnity by the charterers in the terms set out in clause 33(6) (c) (i) to (iii) as qualified by (iv) to (vii). The amendment struck out sub clauses (c) (i) to (iv) however. The amendment contemplated that the disponent owners' P&I Club wording would be submitted to the charterers before "*lifting the subs*" i.e. before the voyage or sub-charters became binding between the parties thereto. It is common ground, as I have explained, that this did not occur and that the wording relied on by Trafigura was only sent to the charterers on 14 October 2019, after the "*subs*" had been lifted – i.e. after the voyage and sub charterparties had become binding between the parties thereto. This is something that PBSA relies on as suggesting there is no binding obligation to indemnify as between CSPL and Trafigura. The Indemnity wording that Trafigura maintains is binding between it and CSPL is that set out in paragraph 14 above.

## The Issues

26. In summary, the issues I have to determine as between Trafigura and CSPL are:

    i) What is the meaning and effect of clause 33(6) in the voyage and sub-charters?

    ii) What was the meaning of the Discharge Orders?

    iii) Was the Indemnity not given for some reason?

    iv) Was it a condition precedent to the giving of the Indemnity that "Owners' P&I Club wording" had to be provided before lifting subjects?

    v) Was the Indemnity not given because no freestanding signed letter of indemnity ("LOI") was issued by CSPL?

    vi) What is the correct quantification of Trafigura's trading losses for the purposes of identifying what such losses, if any, can be recovered by Trafigura pursuant to the Indemnity?

    As between the Clearlake parties and PBSA, there are two broad additional issues, being first, the Contractual Lacuna Issue and secondly the Clearlake parties' claim to recover their own losses, as well as an indemnity in respect of their liabilities to Trafigura.

## Applicable Construction Principles

27. The principles that apply to the construction of contracts are well known. In summary:

    i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary

meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 21;

iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and

viii) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11. As Lord Leggatt JSC held at paragraph 108 of his judgment in Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29; [2021] AC 1148 the *"… modern view is … to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation"*.

For reasons that I have explained already and which are essentially common ground, none of the parties pretends that either charterparty is a competently drawn document, much less one that can fairly be described or approached for construction purposes on the basis that they were drafted by skilled professionals. In those circumstances, it is likely that contextual issues will play a much more significant role in any construction issues that matter than would otherwise be the case and business common sense as understood in the way described above is likely to play a significant part in arriving at a true construction of the document. Some reliance was placed by both Trafigura and the Clearlake parties on the construction of the charters by the judges who determined the interlocutory applications for mandatory orders enforcing the indemnity relied on by the claimant – see the Miracle Hope (No.1) [2020] EWHC 726 (Comm); [2021] 1 Lloyds Rep 533 (Henshaw J) and the Miracle Hope (No.2) [2020] EWHC 805 (Comm); [2021] 1 Lloyds Rep 543 (Jacobs J). This is forensically unsurprising given that those parties were successful in those applications. No one suggests however that these conclusions are binding on me or constitute a precedent which is only not binding on me because they are judgments of judges of coordinate jurisdiction. In any event, it would be inappropriate to adopt the reasoning used in the interlocutory judgments to resolve issues where the relevant evidence has been tested at trial in a manner that by definition was impossible at the hearing of the interlocutory applications. In those circumstances, I consider it safer to arrive at my own conclusions on the issues that arise free from what has gone before.

## The Liability Issues other than the Contractual Lacuna Issue

28. As I have said, the charter by Trafigura to CUSA is in materially similar terms to that between CUSA and PBSA. For that reason, CSPL adopts each of the arguments advanced by PBSA for the purpose of ensuring that it does not end the trial with a liability to Trafigura that it is unable to recover from PBSA. No attempt was made by Mr Thomas KC to do anything other than adopt the arguments advanced by Mr Byam-Cook KC on behalf of PBSA. In reality therefore, on the issues I am now considering the debate was carried on between Trafigura on the one hand and PBSA as a proxy for CSPL on the other.

29. Mr Byam-Cook submits that the effect of the failure to submit an Owners' P&I Club wording prior to "*lifting the subs*" was that there was no entitlement to any indemnity and that the effect of the agreement between the parties was that Trafigura was obliged to discharge without sight of the original Bills of Lading if asked to do so without any

right or entitlement to an indemnity in respect of any losses that may flow from complying with such a direction. He submits that this conclusion is not altered by retention of " … *Following indemnit [sic] deemed to be given by Charterers on each and every such occasion …*" because those words were intended to apply to the provisions that follow and those no longer contain any indemnity because sub clauses (c)(i) to (iii) have been struck out. Textually I agree that those words were originally intended to apply to the indemnity contained in sub clauses (c)(i) to (iii). I also agree that there is no indemnity in the sub clauses that follow and have not been struck out. It follows from this that it cannot have been the intention of the parties to refer to sub clauses (c)(i) to (iii) since it had been agreed they did not form part of the agreements between the parties. It follows that the parties must have intended that however linguistically inapposite, the words would apply to something that mattered.

30. There are two possibilities. The first is that it was intended to apply to the indemnity contained in " … *the Owners' P&I Club wording to be submitted to Charterers before lifting the "subs*"" even though the word "*following"* is not linguistically appropriate to achieve that objective. The alternative is that the sentence was intended to refer to sub clauses (v) to (vii). That is not linguistically appropriate either because none of those provisions contains an indemnity.

31. Of these alternatives, I consider the first is much more likely to have been what was intended, applying sub paragraphs (v) and (vi) in the summary of applicable principles set out above and bearing in mind sub paragraph (vii) and the commercial context summarised at the start of this judgment. I reach that conclusion because the only indemnity within the contemplation of the parties was that referred to in the inserted wording and is consistent with the deletion of sub clauses (c)(i) to (iii) and with the following sub paragraphs that were not deleted not containing an indemnity. It has the benefit of giving effect to the word "indemnity" within the sentence. This conclusion is consistent too with the commercial context being as described in the opening paragraphs of this judgment and avoids the commercial absurdity of assuming that overall the contract should be construed as imposing on a very experienced disponent owner the obligation of discharging without either presentation of original bills of lading or an indemnity against the consequences of so discharging. It follows therefore that subject to the effect of the "*Owners"*" wording not being supplied before the charters became unconditional, the effect of this wording was intended by the parties to result in a deemed indemnity whenever a request under clause 33(6) was made.

32. It is next necessary to consider the effect of the "*Owners"*" wording not being provided before the "*subs*" were lifted – i.e. before the contract was made unconditional.

33. I do not accept that the failure to supply the wording before the charters became unconditional meant that the intention of the parties was that the charterers would be entitled to demand discharge or delivery without presentation of the original bills under clause 33(6) without providing an indemnity. Whilst the purpose of including the words " … *the Owners' P&I Club wording to be submitted to Charterers before lifting the "subs*"" after the contract became unconditional (when by definition what then became a term of the charters could not be complied with) is unclear, it is on balance more consistent with the intention being that discharge without presentation could only be required against the provision of an indemnity rather than the alternative. In my judgment that follows from the language of clause 33(6) as amended when read as a

whole (including what is set out in sub-clauses (v) to (vii)) and in the commercial context that I set out at the outset of this judgment.

34. It was submitted by PBSA that the use of the word "*indemnity"* in the subsequent lines of clause 33(6) does not assist because they relate back to the sub clauses that have been deleted. I agree that was what originally they referred to but that cannot have been the parties' intention once it was agreed that sub clauses (c)(i) to (iii) were to be deleted in favour of the added wording. By retaining the use of the word "*indemnity"* the parties could only have intended to refer to the indemnity that the parties had in contemplation being " … *an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs*"". This not only supports the conclusion that the parties did not intend to empower the charterers to demand discharge without either presentation of the original bills of lading or the provision of an indemnity but also the subsidiary point that the indemnity to be provided was subject to what was set out in sub-clauses (v) to (vii) of clause 33(6). In this regard, reading clauses 1 to 3 of the wording subsequently provided by Trafigura in combination with sub clauses (v) to (vii) within clause 33(6) make sense because they cover different ground. I reject the submission that this conclusion is contrary to that of the Court of Appeal in The Songa Winds [2018] EWCA Civ 1901; [2018] 2 Lloyds Rep 374. That case was concerned with whether some qualifications within a charter party were impliedly incorporated into a letter of indemnity that did not expressly contain them. The Court of Appeal held that they could not on the basis that the letter of indemnity was a separate and free standing agreement. That says nothing about a deemed indemnity arising from the invocation of a deemed indemnity provided for by a clause within a charterparty that contains the relevant qualifications and where the wording of the deemed indemnity was contained in another document incorporated into that clause by reference. Nonetheless that focuses attention once again on the words " … *wording to be submitted to Charterers before lifting the "subs*"".

35. The real difficulty that remains is that no such wording was provided before the voyage and sub-charterparties became unconditional. PBSA submits that in those circumstances it is necessary to spell out of the relevant correspondence a new agreement. I am not satisfied that is the correct analysis in the relevant contextual and textual circumstances. The implication of this submission is that unless a new agreement can be spelt out of the post contractual correspondence either (a) clause 33(6) is of no effect at all, in which case the voyage and sub-charterers would not be entitled to require discharge without presentation of bills of lading or at a discharge port other than that named in the bills of lading; or (b) charterers would be entitled to demand discharge either without presentation of bills of lading or at a discharge port other than that named in the bills of lading without the disponent owners being entitled to an indemnity for so doing. Neither of these outcomes seems likely to be the intention of the parties having regard to the contextual matters to which I have referred. Neither solution represents commercial common sense – If (a) was the intended outcome, the charterers would be faced with potentially very substantial demurrage claims; and if (b) was the intended outcome that would expose the disponent owners concerned to potentially enormous losses that would otherwise be entirely avoidable.

36. Doing the best I can with the admittedly unsatisfactory language used, I conclude that the intention of the parties and the true construction of clause 33(6) applying the principles summarised earlier was that the words "… *before lifting the "subs*"" are

surplus and of no effect as and from the time when the parties agreed that the contract would become unconditional. Had the intention been that there would be no operative indemnity then they would have omitted the inserted words before lifting subs.

37. I accept that language used by the parties should not generally be treated as surplus but "(*i)t is well established law that the presumption against surplusage is of little value in the interpretation of commercial contracts*…" – see The Eurus [1998] 1 Lloyds Rep 351 *per* Staughton LJ (as he then was) at 357, approving Royal Greek Government v. MoT (1949) 83 Ll.L.R 228 *per* Devlin J (as he then was) at 235 and Chandris v. Isbrandtsen-Moller Co Inc [1951] 1 KB 240 *per* Devlin J at 245. It is worth noting that Staughton LJ made those observations in the context of a standard form shipping agreement to which deletions had been made, which he described as being the work of "*... no lawyer, or at any rate no chancery lawyer ...".* The principle that effect should usually be given to all the language used by the parties, if it continues to apply at all, must necessarily take account of the very unsatisfactory state of the amendments to the standard form that have been carried out in this case and the very powerful contextual and commercial considerations referred to above. Commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties at the date that the contract was made. In my judgment reasonable people in the position of the parties to the voyage and sub-charterparties at the date when they became unconditional would not have considered it commercial common sense that either (a) clause 33(6) was of no effect at all; or (b) charterers would be entitled to demand discharge without either presentation of bills of lading or at a discharge port other than that named in the bills of lading without the disponent owners being entitled to an indemnity for so doing. The construction that I favour is one that more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used.

38. There is nothing in the language used that suggests it was intended by the parties that compliance with this provision would be a condition precedent, not least because at the date when the charters became unconditional, if the inserted wording was intended to be a condition precedent, it was one that on the language it was impossible to comply with since the time for compliance passed at the moment it was agreed that the charters would become unconditional. Had the parties considered the requirement to produce the wording to be a condition precedent to the relevant charterparty taking effect, then they would not have lifted subs until the wording had been produced. In fact they agreed to lift subs and by so doing waived compliance with this provision. As Mr Ashcroft KC submitted on behalf of Trafigura, once that occurred the wording referring to the production of the wording ceased to have any meaning or effect.

39. PBSA submits that the words inserted into clause 33(6) were inserted in order to give the charterers in each case the opportunity to consider and consent to the proposed wording. I doubt that was the intention once subs were lifted – that is when agreement was finally reached – for the reasons set out above. However, the construction I favour also gives the charterers that opportunity albeit the consequences of not agreeing are different. If the position is as submitted by PBSA then charterer's option would have been not to fix at all. Under the construction I favour the choice is between providing an indemnity "… *as per Owners' P&I Club wording …*" or not doing so and presenting the original bills of lading and paying demurrage in the meanwhile. This choice is much

more realistically what reasonable people in the position of the parties to these charters would have intended at the date that they lifted subs so that the charters became binding between them. This is all the more likely to have been the intention given the context of the almost ubiquitous use of the International Group's LOI wording and Part I, clause (1)(xii) of the voyage and sub-charters, by which the relevant disponent owners warranted that it was entered in a P&I Club within the International Group of P&I Clubs.

40. The next point taken by PBSA is that it is significant that the added words in clause 33(6) refer not to an indemnity but to "*an LOI*". The point here is that it is submitted that the intention of the parties to be inferred from this language is that a formal written letter of indemnity document would need to be received by the disponent owner concerned before it could become entitled to an indemnity. It is submitted that in the absence of a formal letter from the charterers clause 33(6) was not engaged. The implicit suggestion here appears to be that discharging the cargo was an entirely voluntary act by the owners for which no indemnity was provided, because a letter in the terms of the draft provided on 14 October 2019 was never provided either by PBSA to CUSA or by either CUSA or CSPL to Trafigura.

41. I have no hesitation in rejecting this submission. I reject that submission by reference to the construction of the words "… *Following indemnit [sic] deemed to be given by Charterers on each and every such occasion* …" set out above. In my judgment the effect of this language was to deem there to be an indemnity "… *as per Owners' P&I Club wording* …". If the facts were that an LOI wording was provided and that instead of returning the document duly signed, the charterer concerned indicated by email, fax or telex that it accepted the wording proposed and the relevant cargo is then discharged, then whether this is characterised as a variation, a waiver or an estoppel does not matter. The charterer is bound.

42. PBSA relies on The Songa Winds [2018] 2 Lloyd's Rep 374 as supporting its submissions on this point. It does not. That case was concerned with a qualification contained in a charterparty that did not make it into the letter of indemnity provided. The Court of Appeal rejected the suggestion that the letter of indemnity in that case should be read as incorporating the qualification referred to in the charter because the letter of indemnity and the charter were different and independent agreements. That authority says nothing about the issue I am now considering, which is concerned with the invocation of an indemnity deemed to be given in the circumstances set out in the charterparty.

43. None of the parties ultimately proceeded on the basis that a formal letter of indemnity was required and until it was given no indemnity agreement existed or took effect. On 11 October 2019, PBSA informed its broker that it was considering discharge at a port other than that specified in the bills of lading and then said:

> "As per CP clause 33 we need to issue and sign a LOI to vessel discharge cargo at a port that is different from Bill of Lading.
>
> So, please ask Owners to revert with their comments and a wording for the LOI."

44. This resulted in an email back quoting from the sub charterparty and commenting that " … *Owners are deemed to have been Indemnified by Charterers for discharge of cargo without presentation of Original Bills of lading and/or at a discharge port which is different from that stated on the Bills of lading*" . This resulted in a request that *"(w)e need now to receive the P&I LOI wording to check the [contract] before to decide to schedule the discharge to Yosu*".

45. On 14 October Trafigura sent to Clearlake Operations as agent for CUSA a copy of an LOI wording. It was not what had been requested in that what had been requested was " … *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*", and what was supplied was only wording applicable to either delivery to a port other than that specified in the bills of lading or to a party without bills of lading. What was provided was the International Group of P&I Clubs Group C wording. It does not appear to be in dispute however that the operative part of the wording provided (paragraphs 1, 2 and 3) are materially identical to what appears in the International Group of P&I Clubs Group A wording, which is the wording appropriate for discharge otherwise than on presentation of the original bills of lading. No point was taken by Clearlake Operations that what had been provided did not satisfy what had been requested, no doubt because that was so, and well understood by all parties to be so. On the same day this was forwarded to PBSA. The query from PBSA concerning a part delivery at another port did not develop further.

46. On or about 23 October 2019, Trafigura appointed SPI Marine as its agent in respect of the discharge of the cargo. An entity known as LZH had been nominated originally by PBSA as agent for receivers, and in the result was appointed as SPI Marine's sub-agent in respect of the Bill of Lading 01 parcel. By an email sent to the Master of the Vessel on 25 October SPI informed the Master that it awaited delivery orders without production of the original bills of lading. At that stage, the Vessel was not expected to arrive at the discharge port before 11 November.

47. On 30 October 2019, what are described as being "*Charterer's discharge orders*" were passed to the Master by Clearlake Operations with a copy to Trafigura. Those instructions (which originated from PBSA) defined the receiver as Hontop and, under the heading "*Remarks to Owners*", at paragraph 1, under the sub heading "*LOI INVOCATION*", it is recorded that

> "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."

The reference to "*Part II*" is to a heading that appears above clause 30 in the Shellvoy 6 wording. The "*INVOCATION"* reflects PBSA's understanding to be that it was entitled to request discharge (without, for the moment, considering whether that meant delivery) without presentation of bills of lading under clause 33(6). It also reflects its understanding that it could make such a request without also offering a formal letter of indemnity but that a deemed indemnity would result from clause 33(6) being invoked (hence the use of the phrase "…(*i)n lieu of an LOI*"). Had it been thought there was an

obligation to discharge without presentation of the original bills of lading and without an indemnity then the words "…(*i)n lieu of an LOI*" would not have been included. There would simply have been an assertion that discharge was to take place without an indemnity as had been agreed. The discharge orders were passed on by Clearlake Operations to the Master with copy to Trafigura in materially similar terms and with the same effect.

48. On 30 October, the Master acknowledged receipt and confirmed that the Vessel would comply with the discharge orders provided. Although it was suggested that there may be a difference as between the two claims on the issue I am now considering, I do not accept that to be so. The same communications are relied on in both cases and there is nothing that suggests they should be given different effects in each of the claims. On the issue I am now considering the outcome depends in each case on the effect of the 30 October invocation referred to above. The communication onwards by Clearlake to Trafigura was in material similar terms to that sent by PBSA to Clearlake.

49. In attempting to resolve the issue I am now considering I start by noting that there is no material substantive difference between clause 33(6)(i) – (iii) of the voyage and sub charterparties, the full text of which is set out above, and paragraphs (1) – (3) of the LOI wording provided on 14 October 2019. Further, paragraphs (1) to (3) of the International Group form supplied by Trafigura on 14 October are in materially similar terms to the form (International Group Form A) that applies to delivery without presentation of original bills of lading. That this was so was accepted by Henshaw J in the Miracle Hope (No.1) at [14] and was not challenged during this trial. The use of the International Group of forms can have come as no surprise to either Clearlake or PBSA since, as noted already, in the Trafigura Charter Trafigura had warranted that it was entered in a P&I Club within the International Group of P&I Clubs. A similar warranty was given by CUSA in the sub-charter. Given that fact, and that the International Group's forms are as widely used as Mr Thomas implied or ubiquitous as Mr Ashcroft KC put it in his oral submissions – see T5/130/10-11 - it is inconceivable that any of these parties was not fully aware of that fact. Each of the parties to this dispute are very substantial and experienced ship owners and operators and (in PBSA's case) oil traders, who each operate on a global scale. For those reasons, I accept the submission that it is inconceivable that a party such as either Clearlake or PBSA would or could reasonably have thought that Trafigura would be relying on anything other than the International Group forms by no later than when the 14 October communication had been received and passed along the charter chain. In my judgment it was because that was so that PBSA expressed the invocation within the discharge orders in the terms that it did.

50. I fully accept that if these transactions were being handled by sophisticated lawyers for each of the parties things would have been different. However that was not the position. Each step was being handled by experienced shipping and commodity trading professionals, each of whom would have been intimately familiar with the points I have made. It would be unreal to attempt to resolve the issue I am now considering ignoring that critical factor. PBSA's officials knew (or ought reasonably to have known) that (i) it could not expect discharge or delivery without presentation of original bills of lading without offering an indemnity; (ii) Trafigura was relying on the wording in the International Group forms; (iii) both Trafigura and CUSA had warranted that they were respectively entered with P&I Clubs in the International Group and (iv) the language of the International Group's Form A was in materially similar terms to that supplied by

Trafigura on 14 October. In my judgment that is why PBSA was content to invoke clause 33(6) in the way it did on 30 October 2019.

51. In the absence of any other explanation, I conclude that in the context set out above PBSA's invocation meant that instead of issuing a formal signed LOI, PBSA, when it sent its email of 30 October, intended to invoke clause 33(6) in return for indemnifying Clearlake in the terms set out in clauses (1) to (3) of the form supplied by Trafigura on 14 October together with and subject to sub clauses (v) to (vii) within clause 33(6) and that Clearlake had a similar intention up the charter chain to Trafigura. It was open to PBSA and Clearlake to invoke clause 33(6) because that is what it permitted and when it was invoked there was deemed to be an indemnity on Trafigura's P & I Club terms because that is the effect of the clause as I have construed it. In reality PBSA and CUSA knew full well what the effect of so doing was. It knew the wording relied on and it knew that invoking clause 33(6) would deem an indemnity to be provided because that is what was meant by the use of the phrase "*…(i)n lieu of …"*. To decide otherwise would be commercially absurd. Indeed, I would go further. It is inconceivable that discharge instructions would have been accepted other than on this basis. It was only months following discharge that the points I am now considering (which do not include the Contractual Lacuna Issue to which I turn below) were taken by PBSA. To accede to such submissions in those circumstances would be obviously unfair and would defeat the reasonable expectations of the parties – see First Energy UK Limited v Hungarian International Bank Limited [1993] 2 Lloyds Rep 194 *per* Steyn LJ at [196]. If and to the extent that it was necessary to do so, I accept the submissions of Clearlake and Trafigura that any requirement for a formal letter of indemnity, as opposed to an agreement in correspondence and by conduct, was waived or PBSA is estopped from relying on such a requirement in the circumstances.

52. The final issue that I need to address at this stage concerns the distinction between discharge and delivery. PBSA contend, passing on an argument made by Natixis in the Singapore proceedings, that in principle there is a distinction between an instruction to discharge and an instruction to deliver. Mr Byam-Cook submits, borrowing Natixis' argument, that this distinction was drawn by PBSA in its discharge orders and that therefore what owners should have done was to discharge the cargo at the discharge port but retain control of it. As I have said already and repeat, there was no suggestion to that effect in the Discharge Orders other than what is said to be the effect of the use of the word "discharge".

53. In my judgment this is another entirely unreal submission made on behalf of PBSA. This issue resulted in evidence from the Master of the Vessel to the general effect that such an arrangement is not possible at any rate at this discharge port. I accept that evidence. That makes it objectively improbable these very experienced charterers and oil traders would have meant or understood that to be the effect of the discharge orders that emanated from PBSA. The Master's evidence was also that he had never experienced such instructions. I also accept that evidence, not least because there is none adduced which challenges it. In my judgment this is consistent with any such instruction being very much the exception rather than the rule and one which required the clearest expression if that is what was intended.

54. The Master also gave some evidence as to what he understood the discharge instructions to mean. In my judgment that evidence is inadmissible. What the instructions meant is

something to be determined objectively. Although the discharge/delivery issue has taken up a substantial amount of the written argument and to a lesser extent the oral argument, I intend to deal with it in fairly short order.

55. I accept that in principle there is a distinction to be drawn in shipping law between discharge and delivery. Discharge is removing the cargo from the ship and delivery is passing it to a receiver. That said, whether in fact such a distinction is applicable is critically dependent on context. In my judgment it is entirely wrong to conclude that PBSA was drawing or could reasonably be understood to be drawing such a distinction or giving instructions that were limited to discharge in the sense mentioned a moment ago. I reach that conclusion for the following reasons.

56. First, simply looking at the discharge instructions themselves, there is nothing within them that states or implies that what PBSA was requiring owners to do was discharge the cargo but retain control of it. If that was to occur then it would have been necessary for one of the parties to hire storage tanks at the discharge port or otherwise arrange with the discharge port officials for the cargo to be stored to the order of owners. That involves obvious cost for which one of the parties would be responsible that was unquantifiable at the time the supposed instructions to this effect were given. It was unquantifiable because there was no attempt to define when the storage obligation would end or in what circumstances. That was so because it was not intended that the discharge instructions be read in the way now contended for. There is no reason to suppose that owners would incur such an open ended cost without agreement as to who was to bear the costs, particularly when the alternative would be for owners to retain the cargo on board until original bills of lading were presented and charge demurrage in the meanwhile.

57. Secondly, as I have said already, PBSA invoked clause 33(6) of the charterparty. That clause is concerned (in both its amended and unamended form) with "*discharge"* without presentation of original bills of lading. If the cargo was to be discharged but remain under the control of owners, then discharge without presentation of original bills of lading by the receiver would not arise and the indemnities provided in the unamended form would be entirely inappropriate and largely if not wholly unnecessary. Thirdly, it is clear from the unamended language at least that the words discharge and delivery were used in that clause interchangeably – see by way of example the phrase "… *delivering such cargo* …" in sub clause (i); and "… *delivered cargo …*" in sub clause (ii) compared and contrasted with the use of the phrase "*discharge such cargo …*" in the opening line of clause (c) and the word "*discharge"* in clause (iii) in the same context. The amendment made to the clause does not make any difference, particularly given the context. In truth the word discharge and deliver or delivery are used interchangeably by these parties in these charters and in the context in which they are used mean the same thing – that is delivered to a third party without presentation of original bills of lading or to a different port or in a different quantity. Returning to the discharge orders, the LOI Invocation refers to "*discharge"* but in the context of the use of that word interchangeably with "*delivery"* in clause 33(6), and the absence of any suggestion in the discharge instructions that the cargo should be discharged but not delivered to the receiver identified as such in the discharge instructions. Given what is at best the extreme rarity of such instructions and the cost implications of such an instruction, such an instruction would have to be given in clear terms if that was what was intended.

58. Fourthly, the discharge orders have to be read as a whole. They identify the receiver as being Hontop. It is difficult to see why that would be so if the intention was that the discharge orders were to be read as an instruction to discharge but not to deliver, at least without an express qualification to the apparent right of the receiver to take delivery of the cargo. Similar considerations apply to the requirement that the owner appoint agents by reference to the receiver in clause 1 of the contractual requirement section.

59. All this, in combination with the absence of any evidence that arrangements for the discharge of a cargo to be held to the ship owner's order could be made at this particular discharge port, the Master's evidence (which I have accepted) that they could not, and the absence of any attempt by PBSA either to make or pay for such arrangements or instruct that they be made, lead me to conclude that the construction for which PBSA contend should be rejected as entirely unreal.

60. In summary therefore, I am satisfied in principle that in the events that have happened PBSA was obliged to indemnify at least CUSA, and CSPL was obliged to indemnify Trafigura in the terms set out in clauses (1) to (3) of the International Group Form C wording but subject to the qualifications in sub clauses (v) to (vii) in clause 33(6) of the charterparties. The liability issue that remains and to which I now turn is whether PBSA has no liability to CUSA because CUSA has no liability to CSPL.

**The Contractual Lacuna Issue**

61. I have summarised the nature of this dispute earlier. In essence, PBSA contends that CUSA is not liable to CSPL as a result of the delivery of the cargo in accordance with PBSA's orders even if otherwise the indemnities the subject of these claims are enforceable. For the reasons set out above, I have concluded that in principle the indemnities are enforceable so it is now necessary to resolve the Contractual Lacuna Issue before turning to quantum.

62. The Clearlake parties argue that this defence should be rejected because:

    i) The Clearlake parties intended to be bound by an internal indemnity up and down the charterparty chain where an LOI or deemed indemnity had been invoked against one Clearlake entity (CUSA) and invoked by another Clearlake entity (CSPL) up the charterparty chain ("Ground 1(a)");

    ii) The Clearlake parties agreed to an internal charter on the Asbatankvoy COA terms, which gave rise to a deemed indemnity on "Owner's P&I club wording" when an LOI or deemed indemnity had been invoked against one Clearlake entity and invoked by another Clearlake entity up the charterparty chain ("Ground 1(b)");

    iii) A contract is to be implied from the Clearlake parties' conduct in CSPL offering an indemnity to Trafigura after CUSA had received a deemed indemnity from PBSA and had come under an obligation to PBSA to procure delivery in accordance with PBSA's instructions ("Ground 1(c)");

    iv) PBSA is liable to CSPL under the PBSA Indemnity because CSPL is an agent of CUSA and entitled to enforce that contract under the Contracts (Rights of Third Parties) Act 1999 ("Ground 2"); or

v) To the extent Trafigura is successful in its arguments, CUSA is liable to Trafigura under the Trafigura Indemnity and so can recover its own liability under the PBSA deemed Indemnity to which it is a party ("Ground 3").

There is a potential difficulty about the Ground 1 analysis, which is that at the time CSPL provided its indemnity to Trafigura, CUSA not CSPL was the charterer of the Vessel from Trafigura. That only apparently changed after discharge of the Vessel, although before any claims were made for mis-delivery. It is only Ground 1(c) that most clearly avoids that point.

63. The Clearlake parties submit that if the issues that arise are resolved in favour of PBSA then the commercial purpose of putting in place a chain of indemnities up the charterparty chain as the price of obtaining delivery without presentation of bills of lading would be defeated. The Clearlake parties maintain that in resolving these issues, a clear view of the relevant commercial context should be maintained. They submit that includes (i) the importance of these arrangements to the smooth running of sea transport as explained earlier in this judgment; (ii) that typically there will be a lengthy chain between the head owner (to whom a mis-delivery claim will be addressed) and the end charterer requesting or requiring for its own commercial purposes a delivery without presentation of the original bills of lading; (iii) the commercial importance of indemnities offered as the price of agreeing such discharges includes the importance of being able to pass liabilities from head owners to those who sought delivery without presentation of the original bills of lading; (iv) many of the world's largest disponent owners consist of groups of companies in which one group member charters vessels in and another charters them out; and (v) where that is so, there is no good commercial reason why the intra group companies should not be as interested in passing claims up and down the charter chain as any other owner or disponent owner in the chain.

64. This leads the Clearlake parties to submit that if they are right in their submissions on the issue I am now considering, it will result in the "*commercially sensible result"* that PBSA will bear ultimate responsibility for the consequences of its own commercial decision to request discharge in consideration of the indemnity that it offered. The alternative outcome has the effect of conferring a US$85m windfall benefit on PBSA at the expense of the Clearlake group, a result that Clearlake characterises as commercially absurd. I accept that this is not an outcome that PBSA or the Clearlake parties could have intended and thus the point now taken by PBSA is both technical and opportunistic. The question that remains and the only one that matters is whether it is correct.

65. As PBSA's case was opened on this issue, its submission was that the indemnity chain was broken by the Clearlake parties on 2 December 2019, when they each agreed with Trafigura that the voyage charter from Trafigura to CUSA would be "*amended*" so as to substitute CSPL for CUSA as charterer. I use the word "*amended*" because that is the word that Mr Thomas uses. However, it is an imprecise word capable of covering either a variation or a novation, each of which has different legal consequences or is capable of doing so. Mr Thomas submits that PBSA has not explained how this ""*amendment*"*... broke the chain of indemnities"*.

66. In my judgment that is relatively straightforward. As I explained earlier in this judgment the sequence of events was that PBSA invoked clause 33(6) including the deemed

indemnity as between it and its disponent owner, CUSA. However, although the charterer from Trafigura was CUSA, in fact the indemnity was provided to Trafigura by CSPL. I am willing to accept that it had been intended that CSPL would charter in the Vessel from Trafigura and that CUSA would charter the Vessel out to PBSA. Had that happened it would be relatively straightforward to infer an obligation by CUSA to indemnify CSPL in these circumstances. However, that is not what happened. CSPL was not under any obligation to provide Trafigura with an indemnity at the time when in fact it provided it. However, that is what it did. I explain why that was so below. This lacuna in the charter chain was only apparently rectified by the agreement between CSPL, CUSA and Trafigura in December 2019, which the Clearlake parties characterise in their closing submissions as being "*... in order to facilitate payment of freight ...*".

67. The sole record of that arrangement is that referred to earlier. It is contained in an email and purports to record an agreement between CSPL, CUSA and Trafigura by which it was agreed that the voyage charter of the Vessel by Trafigura to CUSA would be "amended" so that the charterer became CSPL in place of CUSA with all other terms remaining the same. Plainly the intention was that all past and future charterers' liabilities under the Trafigura charter would become the responsibility of CSPL in substitution for CUSA.

68. No time was taken at trial to consider how this arrangement should be characterised. Realistically, it can take effect only as either a variation or a novation.

69. Novation occurs when a new contract between different parties is substituted for an existing contract. The effect of such an agreement (if that is what occurred in this case) is that CUSA's rights and obligations under the original voyage charter with Trafigura would be assumed by CSPL under a new contract with Trafigura. This requires both the consent of all parties (CUSA, CSPL and Trafigura) and consideration for both the discharge of the existing agreement and the new agreement. It is not suggested that any of the three parties concerned did not consent to the new arrangement, nor was it suggested by anyone that there was insufficient consideration to support such a novation, which in any event is usually found from the agreement to discharge and assume rights and liabilities and accept performance by the new party. A novation will generally have the effect of extinguishing the original contract (in this case between Trafigura and CUSA) and replacing it with another (in this case between Trafigura and CSPL) so as to transfer both the rights and obligations under the charter from CUSA to CSPL. If what happened was a novation, then its effect was to extinguish all liabilities by CUSA to Trafigura and render CSPL liable to Trafigura under the voyage charter in respect of liabilities accruing before as well as after the novation. Whilst a variation so as to add a party to an existing contract is possible, that is not what is suggested by any of the parties to have happened here. This is unsurprising since the 2 December email is consistent only with a substitution not a variation to add a party. CSPL appears to accept that the addendum brought about a valid novation since it accepts that it became liable for all past and future liabilities and obligations under the voyage charter.

70. In those circumstances, I conclude that the voyage charter was successfully novated by an agreement contained in or evidenced by the 2 December email so that CUSA ceased to have any liabilities under it and CSPL assumed all such liabilities. If (as I conclude was the case) the voyage charter was successfully novated, then CUSA ceased to have

any liability to Trafigura from the date of the novation (2 December 2019). However, that of itself says nothing about what liabilities CUSA might have to CSPL by reason of its internal arrangements to the extent those give rise to legally enforceable obligations, or whether CUSA would be entitled to an indemnity in respect of any such obligations from PBSA under PBSA's deemed indemnity to CUSA. It is against that background that each of the arguments on which CSPL relies for the proposition that CUSA is liable to indemnify CSPL (and, therefore PBSA is liable to indemnify CUSA) has to be considered.

71. I turn first to the Clearlake argument that they intended to be bound by an implied internal indemnity up and down the charterparty chain because clause 33(6) had been invoked against one Clearlake entity and by another Clearlake entity. In considering this it may be relevant to remember that at the time when CSPL agreed to indemnify Trafigura, CUSA, not CSPL, was the charterer from Trafigura. That only became so when the charter between CUSA and Trafigura was novated. I return to this point below.

72. The Clearlake parties submit the evidence establishes a clear intention to ensure an unbroken chain of charter and indemnity contracts and that was sufficient to give rise to an implied indemnity contract either on 30 October 2019, when CSPL invoked clause 33(6) (even though of course it was not party to the voyage charter on that date and for reasons that I explain below was operating under a mistake as to the identity of the charterer from Trafigura at the time) or alternatively on 2 December 2019, when the novation took place. It was also on that date that the Clearlake parties assert that an internal charter was entered into between CUSA and CSPL on the Asbatankvoy terms.

73. Both in his written and oral closing submissions, Mr Thomas was at great pains to impress upon me that no corporate group in Clearlake's position would want to break a chain of indemnities so that liabilities could not be passed down the chain and that an express intention to that effect should be found or inferred and a contact of indemnity between CSPL and CUSA implied. I agree that it would not intentionally have wished to do so. Some reliance was also placed on the judgment of Jacobs J in The Miracle Hope (No.2) (ibid.) but that is mistaken firstly for the reasons given earlier, but also because Jacobs J did not have to consider the point I am now considering and expressly did not resolve it – see paragraphs 43-47 of his judgment as to what he did decide, and paragraph 48 as to what he did not. The judgment of Henshaw J in The Miracle Hope (No.1) does not assist on this point either since at that stage the only defendant was CSPL and he proceeded on the basis of the effect of the addendum and that all the relevant events occurred after that had taken effect. Henshaw J did not have to consider the point I am now addressing.

74. For there to be such a contract, the parties asserting the implied agreement must establish

> "…(a) agreement on essentials of sufficient certainty to be enforceable, (b) an intention to create legal relations and (c) consideration'. At paragraph 102, Mance LJ continued by explaining the distinction between express and implied contracts: '[w]here there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create

> legal relations may commonly be assumed ... It is otherwise when the case is that a contract should be implied from the parties' conduct ... It is then for the party asserting a contract to show the necessity for implying it'"

- see Re MF Global UK Limited (In Special Administration) [2016] EWCA Civ 569; [2016] Pens. L.R. 225 *per* Vos LJ as he then was at [36]. Because what a party does may be as consistent with an intention to contract as with other possibilities, " … *the intention of the parties may be relevant in determining the existence of an implied contract … This is echoed by Bingham LJ in Blackpool Aero Club supra at page 1202, where he said that '[h]aving examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create legal relations and that the agreement was to the effect contended for*." .

75. Turning to the facts of this case, when Mr Chee of Clearlake wrote to Trafigura on 30 October 2019 stating "*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*", CPSL thereby became bound to indemnify Trafigura on the terms of the indemnity referred to earlier. In writing as he did, Mr Chee erroneously proceeded on the basis that CSPL had chartered the Vessel in and CUSA had chartered it out in accordance with established Clearlake practice. Mr Ong's evidence was that Mr Chee had made an error and that he had explained that to Mr Chee – see T2/57/7-9. Mr Ong was cross examined by reference to internal documentation passing thereafter that suggested Mr Chee at that later stage thought the chain was Trafigura-CUSA-PBSA. I am not satisfied that negatives his evidence on the point I am now considering or shows that Mr Chee was not proceeding on the basis of a mistaken belief that the chain had been corrected on 30 October. I reach that conclusion because Mr Chee's actions only make sense on the basis that he was then operating under the mistaken impression that the chain was PBSA – CUSA – CSPL – Trafigura. I accept Mr Ong's evidence on this point therefore and find that an error had been made as he alleges. No other commercially rational reason has been suggested as to why Mr Chee would have adopted the course he did other than on the basis that he was mistaken as to the true chain. It was this error that was corrected by the novation of the charter from Trafigura. By that date all the operational parts of the charter had been performed and as I have said the only purpose of the novation could have been to place CSPL in the shoes of CUSA for all purposes including any liabilities that had already arisen. That is consistent with an error having been made, that error being that CSPL not CUSA should have been the charterer from Trafigura, and that error being intended to be corrected by the novation. It is not obvious what other purpose there could be in the novation at that stage.

76. None of this addresses the point made by PBSA namely as to how the gap between a charter in by CSPL and a charter out by CUSA was to be bridged if and when delivery otherwise than on production of original bills of lading was sought and the indemnity machinery was invoked. On the face of it, unless there was an internal indemnity provided by CUSA to CSPL the chain would break down whether the original chain was as intended or as it became following novation. It is to that issue that the Clearlake parties' case on implied contract focusses.

77. I accept that prior to 30 October, there was no practice of providing an express indemnity between CUSA and CSPL. That is apparent from what in fact Mr Chee did

on this occasion which was to invoke clause 33 of the relevant charter party in his email of 30 October on behalf of CSPL to Trafigura without seeking to put in place any internal indemnity between CUSA and CSPL, when as I have said he mistakenly assumed the chain was PBSA-CUSA-CSPL-Trafigura. I accept Mr Thomas's submission that this appears to have reflected the practice adopted within the Clearlake group down to that date at least where CSPL chartered in and CUSA chartered out. Mr Thomas submits and I accept that the evidence available supports the conclusion that in acting as he did Mr Chee:

> "…was doing what Clearlake had done many times before: receiving an LOI on behalf of CUSA and giving an LOI on behalf of CSPL. This was done no fewer than thirteen times in the two months prior to the MIRACLE HOPE fixture. That is unsurprising, given how often LOIs are relied upon in the oil trade in the absence of bills of lading..." [Emphasis supplied]

On none of these occasions was an express indemnity issued between CUSA and CSPL. It shows that it was not the practice within Clearlake to issue such indemnities. This was Mr Ong's evidence – see paragraphs 12-13 of his first statement. I accept this evidence as consistent with the practice on the prior transactions relied on by Mr Thomas. On this evidence, I accept that it was not the practice within the Clearlake group to issue internal indemnities where the charter chain was between CSPL as disponent owner and CUSA as charterer.

78. As Mr Thomas submits, it is necessary to decide why that was the practice. One possibility is that it never occurred to the Clearlake officials or management that indemnity obligations needed to be passed up and down the charter chain. I can reject that possibility immediately because it is inconsistent with Mr Lynch's email of 29 August to Mr Ong (which referred to the need for LOIs to be "*back to back"*) and because it is inherently improbable that this requirement would not be known to the officials and managers of one of the largest ship operators in the world.

79. A second possibility is that it was intended that whenever a ship was chartered in by CSPL and chartered out by CUSA, the risk posed by a mis-delivery would come to rest with CSPL even though the request to deliver without presentation of original bills of lading came downstream in the chain from CUSA and CSPL could gain no commercial advantage from adopting such a course. I reject that too as a possibility because it is commercially and inherently improbable to a high degree that CSPL would take such a risk. Aside from that, it too is inconsistent with what Mr Lynch said in his email to Mr Macleod of 29 August 2019. As Mr Thomas submits, an internal statement that " ... *LOls etc will need back to back and we need to make sure it works*" shows that express consideration was being given to ensuring that liabilities should flow up and down the charter chain.

80. This leads Mr Thomas to submit that Clearlake did not issue an internal LOI because the Clearlake group intended an internal indemnity to arise whenever CUSA was the beneficiary of an express or deemed indemnity and CSPL provided an indemnity in order to enable liabilities to pass down the indemnity chain.

81. I accept that submission for the following reasons. Firstly, the necessity for an implied indemnity agreement to arise is obvious whenever CUSA was the beneficiary of an indemnity whether deemed or otherwise and CSPL gave a counter indemnity. If that was not the case then the losses arising from mis-delivery for which CSPL had provided an indemnity would fall on CSPL and could never be passed on by it to CUSA and by CUSA onward to or ultimately to the instigator of the mis-delivery. Secondly, that this was the internal intention is obvious from the 29 August 2019 email referred to above, which is notable for its recognition for indemnity obligations to be "*back to back*" coupled with the absence of any mention of an express internal indemnity requirement. Thirdly, the omission to issue an internal express letter of indemnity was not an error that arose in this case alone but not others. It was the established practice within Clearlake as the earlier transactions referred to above demonstrate. Fourthly, in my judgment it is consistent with the intention being as Mr Thomas describes that when, in April 2020, a contract note was generated in order to record an internal charter following the novation of the Trafigura charter, no attempt was made to generate an internal LOI. This is consistent with the position being as reflected in the 29 August email, whereas I have said there is no mention of the need for an express internal LOI. Fifthly, I have referred to the thirteen times in the two months prior to the fixture of the Vessel where indemnities have been given by CSPL having been received by CUSA. On none of those occasions was an express internal LOI entered into. Given the exposure implications that reveals, I regard it as strongly supportive of the intention being as Mr Thomas contends.

82. Sixthly, Mr Ong's evidence (other than in one respect to which I turn below) was consistent with the intention being as I have described, as was that of Mr Lynch. Mr Ong's evidence was that the same person handled discharge operations for both CSPL and CUSA and so would be the person who would both receive and pass on indemnity invocations – see paragraph 13 of his statement:

> "13. The Clearlake operations person would not send her-or himself an email invoking the LOI, but it was understood by the operations team that where an LOI has been invoked against one Clearlake entity, and a different Clearlake entity is bound by an LOI against owners up the chain, there would be an internal LOI between the two different Clearlake entities without the need for any written LOI invocation as between the Clearlake entities to ensure an unbroken indemnity chain. There is a need to have the indemnity chain complete as CCUSA and CSPL are separate entities who would need to be able to pass LOI claims up and down the charterparty chain. However, Clearlake does not have any practice of issuing internal LOI documents to evidence this internal indemnity agreement when CCUSA charters from CSPL … and CCUSA's charterer invokes an LOI."

83. This evidence is consistent with that given by Mr Lynch (at the time relevant to this dispute the managing director of CUSA). Mr Lynch's (unchallenged) evidence on this issue was that " …*as the same operations person acts on behalf of both CSPL and CCUSA, there is no need for the operations person receiving a request from external charterers on behalf of one Clearlake entity to send himself the same request acting on behalf of another Clearlake entity* …" and later that " … *CSPL and CCUSA considered*

*themselves bound by an internal indemnity when there were indemnities up and down the charterparty chain*". Clearlake's practice being that I have described is only explicable on that basis. Mr Lynch was cross examined on the basis that express steps had to be taken before an internal indemnity between CUSA and CSPL could come into existence but that was never accepted by Mr Lynch – see T2/132/3-6;134/3-6; and 134/15. Mr Lynch's evidence on the issue I am now considering is consistent with Mr Ong's evidence and inherently probable given the alternatives being as I summarised them above.

84. Mr Ong's evidence on this issue was the subject of challenge. It was suggested that since he was not personally involved he was unable to state what Clearlake's intentions were, which he rejected on the basis that his understanding of the position was as set out in paragraph 13 of his statement – see T2/88/11-13. In my judgment Mr Ong was qualified to give this evidence by reason of the position he occupied within the organisation of CSPL, as to which see paragraph 1 of his statement, where he says that he is and has at all material times been Head of Shipping Operations at CSPL and was at the time one of its directors.

85. It was suggested to Mr Ong that the first time the internal LOI point had come under scrutiny was in relation to the Miracle Hope fixture, which Mr Ong apparently agreed with – see T2/87/9-18. It is important to understand that this was not as I read his evidence an acknowledgement that no one had thought about the need for internal indemnities. Such evidence would have involved an abandonment by him of what had gone before and in my judgment that was not a fair summary of what he intended to say. These answers were concerned with a different issue – see T2/86/16-87/18. If that is wrong, I reject that part of his evidence as inconsistent with both the contemporaneous material referred to above and inherent probabilities based on the commercial context also considered earlier. It is also inconsistent with Mr Lynch's evidence on this issue.

86. Mr Byam-Cook was critical of the fact that Clearlake had not called Mr Chee to give evidence. He invited me to draw adverse inferences from that fact. The principles that apply where such an allegation is made were stated originally in Wisniewski v. Central Manchester Health Authority [1998] PIQR 324, where, at page 340, Brooke LJ summarised the applicable principles as being:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2 If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

This statement was considered by the Supreme Court in Royal Mail Group v Efobi [2021] UKSC 33 by Lord Leggatt at paragraph 41. The Supreme Court specifically did not disapprove the statements set out above, which it described as "*sensible"* whilst emphasising that whether:

> "… any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole".

87. Mr Chee's evidence could not be relevant to the question whether Clearlake intended an internal indemnity to arise whenever CUSA was the beneficiary of an express or deemed indemnity and CSPL provided an indemnity in order to enable liabilities to pass down the indemnity chain. That issue depends, in so far as it depends on oral evidence at all, on the evidence of the senior managers of the companies concerned. That evidence was adduced. Both Mr Ong and Mr Lynch were and are senior managers within the organisation, who were well able to give evidence relevant to the issues that matter, much of which was not challenged and/or is consistent with contemporaneous documentation and is inherently probable. There was some suggestion that Mr Chee's understanding was that up to 18 December CUSA was the only Clearlake company in the charter chain. That is immaterial to the intention of the companies concerning an internal indemnity that I am currently considering. That being so I do not consider it appropriate to draw adverse inferences applying the principles set out above.

88. Bringing all this together, I conclude that this evidence, when read and considered in the round and in the context in which it arises, establishes that CSPL and CUSA intended that there should be an internal indemnity that was binding between them and so was capable of enabling any obligations that arose from compliance with PBSA's delivery orders to be passed down the charter chain.

89. Returning to the requirements for an implied internal agreement, I am satisfied that there was agreement in terms that were sufficiently certain to be enforceable – that is that CUSA would indemnify CSPL in respect of the latter's liabilities to the entity from which it had chartered the relevant ship, where CUSA had chartered that ship out. The consideration for that agreement is the same that supports the indemnities given to CUSA and CSPL. In this regard, the fact that CSPL gave an indemnity to Trafigura at a time when it was not the charterer in is not the point since it was in consideration of that indemnity being given that Trafigura acted on PBSA's Discharge Orders. In

relation to necessity, that would be relevant only if I had concluded that the Clearlake parties did not turn their minds to the question of an internal indemnity contract. I have rejected that for the reasons set out above. However, if that is wrong, I would have inferred an intention to effect legal relations in the circumstances of this case. The necessity test identified in the authorities is plainly satisfied on the facts of this case. It is inconceivable and commercially irrational to suppose that CUSA and CSPL intended to bring about a situation in which CSPL bore the losses resulting from complying with instructions from an entity below CUSA in the charter chain to discharge without presentation of original bills of lading. It is that which leads to the conclusion that the necessity requirement is satisfied in the circumstances of this case.

90. Finally, I reject as irrelevant for present purposes that CSPL was not the inward charterer when the indemnities were invoked. As between CSPL and Trafigura, no issue can arise because there is no requirement that an indemnity cannot be effective if offered by someone other than the charterer concerned, as long as what is offered is supported by consideration. As I have said already, the consideration for the CSPL indemnity was the agreement of Trafigura to discharge in accordance with PBSA's discharge instructions. An indemnity contract is a separate agreement from any charterparty to which it relates – see The Songa Winds (ibid.). For that reason the novation of the Trafigura charter has no impact on this. CSPL was liable to Trafigura under its indemnity agreement whether or not the Trafigura charterparty had been novated. In any event, once the novation took effect, CSPL became liable to Trafigura for all liabilities that CUSA had or would have had in the future to the extent that is material.

91. In light of my conclusion on the first way that Mr Thomas puts his case, it is not necessary that I reach any conclusions on the alternatives. However I should make clear that I reject the submission that CSPL is entitled to enforce in its own name the terms of the CUSA indemnity by operation of the Contract (Rights of Third Parties) Act 1999, on the basis that CSPL acted as the agent of CUSA in procuring delivery in accordance with PBSA's Discharge Orders. CSPL was not at that time in any event an agent in any sense for CUSA. It did not become a party to any of the relevant charters until the novation on 2 December. CSPL did not perform any discharge or delivery tasks and was not a party to any relevant contract. I should also make clear that had it been necessary for me to reach a conclusion on the point that, had I concluded there was a contractual gap, this would lead to the conclusion that PBSA ought not to have been required to provide security, I would have rejected that submission for the reasons identified by Jacobs J in The Miracle Hope (No.2) (ibid.). However, given my conclusions so far, this issue does not arise.

## The Quantum Issues

92. Trafigura's pleaded primary case on the sums that it is entitled to recover under the indemnity is:

    i) US$8,452,068 loss and damage by way of the revenue Trafigura says it was prevented from earning consisting of:

        a) US$3,850,389, being the estimated earnings that Trafigura would have received under the P66 Fixture;

b) US$2,157,451, being the earnings it is estimated that Trafigura would have received from a charter following completion of the P66 fixture ("Follow On Fixture") on the basis that it would probably have obtained a fixture to load in Brazil and discharge in China in mid August 2020; and

c) Expenses in respect of time charter hire, port charges and bunkers incurred during the arrest period

less the sums that were earned from the Traf CP (after expenses) over the period that the Vessel would otherwise have been engaged on the P66 Fixture and the Follow On Fixture; and

ii) US$7,350 being costs incurred in defending the head owner's arbitration up to the date of its original pleading.

In the alternative, it claims loss and damage in the amount of what it would have earned under the P66 Fixture plus expenses in respect of time charter hire, port charges and bunkers incurred during the arrest period, less the sums that were earned under the Traf CP (after expenses) over the period from the end of the arrest to the probable end of the P66 Fixture.

93. In any event, it seeks a declaration that it is entitled to be indemnified in respect of the sums that the head owner is successful in recovering or that it is agreed that it should recover in its arbitration against Trafigura.

94. The main issue of principle between the parties is whether Trafigura should be permitted to recover damages by reference to the Follow On Fixture or whether its claim should be confined to either the profits that would have been earned from the P66 Fixture during the period of arrest (the period of 60 days ending on 11 May 2022), alternatively the end of the P66 Fixture on 1 June 2020. In addition, the Clearlake parties and PBSA maintain that the net income derived from the Traf CP (the TCE calculation) should be calculated taking account of all the arrest period expenses. Whilst it will be necessary to consider these points in more detail below, two points are obvious – firstly, to limit recovery in respect of the P66 Fixture to the period when the Vessel was under arrest is unreal because that fixture was for a period that was longer than the period of arrest and the whole of that fixture was lost as a result of the arrest, and secondly to require the arrest period expenses to be deducted from the income derived from the Traf CP would have the effect of requiring Trafigura to bear those (or some of those) expenses, which as a matter of first impression is wrong in principle having regard to the terms of the indemnities by which CSPL and PBSA are respectively bound.

95. The defendants maintain that the assessment of what is due to Trafigura should be carried out applying the same principles that would apply to the assessment of damages, whereas Trafigura maintains that different principles apply because the claim is under an express indemnity that entitles it to recover all loss resulting from the indemnified cause irrespective of whether it was in the reasonable contemplation of the parties. The defendants maintain that the rationale that underlies the approach adopted in damages claims either applies or should be applied to indemnity claims. There is a large measure of agreement as to the financial consequences that should follow on either basis. I turn

to that and to the financial issues in dispute to the extent that is necessary having resolved the issues of principle between the parties.

96. Mr Byam-Cook submits and I agree that to succeed CSPL and Trafigura must show that the losses they respectively seek to recover have been caused by the arrest. This is so because clause 1 of the indemnity responds " … *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* …" and because clause 3 responds " … *in respect of any liability, loss, damage or expense caused by such arrest or detention* …". Contrary to what was submitted on behalf of PBSA, that is not in dispute – see paragraph 88 of Mr Ashcroft's opening submissions, where he accepts at least implicitly that to be recoverable the loss concerned must be the result of the Vessel giving delivery in accordance with the discharge instructions and/or caused by the arrest. To the extent that it was suggested by Mr Ashcroft that once that threshold requirement is satisfied, the indemnity permits the recovery of loss whether or not it is within the reasonable contemplation of the parties, I reject that proposition as contrary to Court of Appeal authority – see The Eurus [1998] 1 Lloyds Rep 351 *per* Staughton LJ at 357 – 361. Whilst I accept that the issue is ultimately one that will turn on the true construction of the contract concerned (a point emphasised by Staughton LJ) there is nothing in the wording of clauses 1 or 3 in Trafigura's tendered wording that suggests the parties intended the indemnities thereby conferred to extend to losses that were not within the reasonable contemplation of the parties and, to that extent, the approach to be adopted is the same as that which would be adopted when assessing damages for breach of contract.

97. However, none of that leads to the conclusion that the recoverable loss is confined to the period of the arrest in the sense that the sum recoverable is limited to an artificial apportionment of the profits that would have been derived from the P66 Fixture over the period of the arrest. It was reasonably foreseeable at the date when the Indemnity was entered into that if the Vessel was arrested, the Vessel would be prevented from being traded in the ordinary course. That plainly included being forced to give up a fixture that could not be performed as a result of the arrest. It is plain that the P66 Fixture was one that the Vessel could not perform as a result of the arrest because she could not arrive at the load port by the laycan date. The losses that flow from that are not those profits (that is freight less the expenses of earning the freight) that would be made over the period that the Vessel was detained, but the whole of those profits that would have been earned from that fixture less any such profits (calculated in the same way) the Vessel was able to make following release down to the date when the P66 Fixture would have ended.

98. That being so, I accept that the Traf CP profits for the period between the later of the end of the arrest and the start of the Traf CP and the date when the P66 Fixture would have ended should be set off against the sum recovered in respect of the P66 Fixture – see The Noel Bay [1989] 1 Lloyds Rep 361 *per* Staughton LJ at 363 (LHC), where he said that:

> "But one problem that almost invariably arises, and does in this case, is that the substitute voyage lasts for longer than the voyage under the original charter-party. The solution commonly adopted is to take a proportion of the profits on the substitute voyage to

> set off against the profits lost on the original voyage; otherwise one would be involved in calculations to the end of the ship's working life."

Mr Byam-Cook's main point of principle concerned the Follow On Fixture. He submitted that in light of what Staughton LJ said in the Noel Bay (ibid.) quoted above, it would be wrong in principle to assess damages by reference to what hypothetically might have been earned under the Follow On Fixture. He submitted that this point was supported also by the formulation of Males J (as he then was) in The MTM Hong Kong [2015] EWHC 2505; [2016] 1 Lloyds Rep 197 at [2]:

> "… the starting point in ascertaining the shipowner's loss was "the amount of freight which the ship would have earned if the charterparty had been performed" and that from this amount there should be deducted "the expenses which would have been incurred in earning it" together with "what the ship earned (if anything) during the period which would have been occupied in performing the voyage."

Applied by analogy to the facts of this case, it was submitted this meant that it was necessary first to ascertain what Trafigura would have earned from the P66 Fixture, from which is to be deducted the costs that would have been incurred in earning that sum, and what the Vessel in fact earned during the period it would have been occupied in performing the P66 Fixture. I agree this is the effect of applying Males J's reasoning to the facts of this case, subject only to three points – (i) this would obviously involve prorating what was earned under the Traf CP and deducting only the sum that would have been earned under it in the period between the start of the Traf CP and the date when the P66 Fixture would have ended, (ii) what was earned under the Traf CP in this context means freight less the expenses incurred in earning that freight; and (iii) on the facts of this case the costs incurred by the Vessel while it was detained would have to be added to the net sum recoverable unless Mr Byam-Cook's submission as to how those expenses should be accounted for is accepted.

99. However, Males J made clear that this was only a *prima facie* measure and that whilst there may be cases where going beyond that measure would be too uncertain and too unpredictable, that was not the position in that case, where there was no need to carry out calculations to the end of the vessel's working life but these could be confined to future events " *… about which the arbitrators were able to make findings … "with some degree of certainty""* – see the MTM Hong Kong (ibid.) at 209 (RHC). In that case it was possible to take into account the lost charter plus two further future fixtures which together coincided with the end date of the substitute fixture. As Males J observed at paragraph 62:

> "If proof of such losses requires complex hypothetical calculations about the future employment of a vessel, the tribunal of fact is likely to conclude that they are too speculative to be recovered. The more complex the calculation, the less likely the claim is to succeed."

100. Mr Byam-Cook submitted that, applying these principles, the period for which loss should be assessed was up until 11 May, being the date on which the Vessel was released from arrest, alternatively up until 1 June which is the date on which she would have completed the P66 Fixture. I have already rejected the notion that the assessment period should end on 11 May. In my judgment however the authorities relied on by Mr Byam-Cook establish a *prima facie* measure that if applied in this case would result in the assessment period ending on 1 June. Trafigura maintains that the cut off date should be 13 August 2020, when it contends the Follow On Fixture would have come to an end. As I have said already the Traf CP did not end until 1 November thereby engaging the problem that there was no time convergence between the Traf CP and either the P66 Fixture or that fixture and the Follow On Fixture, contrary to the position in The MTM Hong Kong (ibid.). This is the problem identified by Staughton LJ in the Noel Bay (ibid.).

101. PBSA submits that Trafigura's approach "… *is artificial, unprincipled and serves to considerably overstate their losses.* ..." As Mr Byam-Cook submits, there is no convergence at that date between end of the Follow On Fixture and the end of the Traf CP. He submits that this means that it is necessary to explore what trading the Vessel might have undertaken between 13 August and 1 November and shows how Ms Richards, the expert whose evidence was adduced by Trafigura, then seeks to address that by hypothesising about a further fixture between 13 August and 1 November, which involves adopting various market rates. He submits that this exercise is flawed because there is evidence that other fixtures, in the event obtained by other vessels, were available that Ms Richards has not taken into account. This is in my view exactly the sort of complexity that Males J deprecated at paragraph 62 of his judgment in The MTM Hong Kong (ibid.).

102. I am satisfied that this case is not one of the exceptional ones identified by Males J in The MTM Hong Kong (ibid.) and that the sum that Trafigura is entitled to recover under its indemnity from CSPL is to be calculated applying the *prima facie* rule identified by Males J in that case and by Staughton LJ in The Noel Bay (ibid.). To do otherwise involves precisely the complex hypothetical calculations that necessarily involves the sort of speculation that Males J held should be avoided. Indeed, it starts with a proposition concerning the availability of an onward charter after the end of the P66 Fixture, which whatever the confidence expressed by Trafigura cannot be characterised as anything other than the loss of a chance, albeit on Trafigura's case a strong chance, and continues with a debate as to the rate that might have been obtained had such a charter been available. Inevitably everything that follows must be approached in a similar way but with increasing levels of speculation. That is entirely inappropriate.

103. The final point of substance concerns the arrest expenses. It is common ground that in the ordinary course of business, the costs of moving a vessel from a discharge port or point to a new load port or point will be treated as a cost of earning from the forthcoming charter, and in a damages claim will be added to the expenses of the substitute charter and deducted from the freight earned in order to ascertain the profit from the substitute venture expressed as a rate per day. In a damages claim that is then used to calculate what loss the owner is entitled to recover in respect of the approach voyage to the load port at which the substitute charter will start. This leads Mr Byam-Cook to submit that the arrest costs should be treated in the same way as approach voyage costs in relation to the Traf CP and should be treated as payable from the start of the arrest period, rather

than assessing Trafigura to be entitled to recover the cost it incurred as a result of the arrest of the Vessel.

104. In my judgment this is wrong in principle and must be rejected. Firstly, arrest costs are by definition not costs incurred by a disponent owner in moving a ship to her substitute engagement. There is no reason why they should be treated as such. Secondly, the effect of the approach that Mr Byam-Cook argues for is to impose on Trafigura the burden of meeting some or all of the arrest costs when those costs have been caused by the events the subject of clauses (1) and (3) of the indemnity. That is so because Mr Byam-Cook maintains that the resulting rate for the Traf CP should be applied from the start date of the arrest. If this is right, then the sum recovered by Trafigura will be the profits lost as a result of losing the P66 Fixture less the per diem profit attributable to the Traf CP running from the date of arrest, which will be artificially low because it is being run from the date of arrest not the date of the start of the Traf CP, and is arrived at after deducting arrest expenses. That results in Trafigura not recovering the expenses it incurred during the arrest period, but only an artificial sum notionally attributable to the Traf CP. There is no principled basis for such an approach. Thirdly, since Mr Byam-Cook maintains that such costs should include the whole of the arrest period, this inappropriate approach would have an even more adverse effect where, as I have concluded, the damages claim duration ends on 1 June when the P66 Fixture would have ended. This led Mr Byam-Cook to accept (see T5/81/5-13) implicitly at least that if the 1 June cut off was adopted then the approach concerning arrest expenses could not sensibly be adopted. I do not accept that as a principled approach either. In my judgment the point is wrong as a matter of principle for the first and second reasons I have given and I decline to adopt it for those reasons. Its impact where damages are limited to the loss of profit from the P66 Fixture simply illustrates in an extreme way why the point is wrong in principle.

105. In summary therefore, I consider that Trafigura is entitled to recover what Trafigura would have earned from the P66 Fixture, from which is to be deducted (i) the costs that would have been incurred in earning that sum and (ii) what the Vessel in fact earned from the Traf CP during the period it would have been occupied in performing the P66 Fixture, less the expenses incurred in earning that sum and (iii) the expenses that were incurred as a result of the Vessel being detained for the period of detention. The time and expenses of the Arrest Period should be excluded in the TCE calculation for the Traf CP, and Trafigura should be entitled to recover the Arrest Period Expenses as a separate loss.

106. The issues that remain concern matters of detail in calculating what sums should be credited against the profits lost as a result of the cancellation of the P66 Fixture. The first concerns the Traf CP Storage Rate. The second concerns the treatment of port expenses incurred at Singapore and Daesan after the Vessel's release from arrest. All other relevant quantum issues have been agreed.

107. Turning to the first of these issues, the background is that the Traf CP was a charter that included an extensive period when the Vessel was used to store its cargo pending discharge. PBSA's point is that had the Vessel been let to an external market as opposed to being the subject of an internal fixture, then a much larger sum per day would have been payable to the disponent owner (Trafigura) for storage than in fact was payable under the Traf CP. In the result, PBSA contend that credit should be given based on a

storage charter at a rate of between US$55,000-60,000 per day, whereas Trafigura maintains that credit should be given at the rate fixed by the Traf CP. At the heart of PBSA's case on this point is that Trafigura would not have fixed with an external charterer at the rates it fixed at internally, and that spot charters with no storage element were readily available in mid May 2020. All this was put to Mr Carrithers, Trafigura's official responsible for fixing the Traf CP and was accepted by him as so.

108. Where this case breaks down is at the level of practicality. The availability of such charters does not lead to the conclusion that the Vessel could have been fixed into such a charter. In my judgment the probability is that it could not for two distinct reasons. Mr Ashcroft submits, and I agree, that the burden is on CSPL to prove that in agreeing the terms of the Traf CP, Trafigura acted unreasonably. In my judgment it has not discharged that burden. My reasons for reaching that conclusion are as follows.

109. The Vessel was regarded as distressed by the time it came to be released. As Mr Carrithers put it in his evidence (which I accept) in paragraph 14 of his statement, the Vessel had been under arrest for two months, that fact was well known to the market, and that meant that no external market participants were keen to charter the Vessel. This was principally because of a concern that having once been arrested she could be arrested again, and no charterer would wish to run the risk of becoming involved in such a dispute for obvious commercial reasons. Mr Eveleigh (PBSA's quantum expert) agreed that it would be necessary to discount the Vessel because of its handicapped status by reason of the Vessel's long period of arrest – see T3/127/23-128/12. As he put it, "(*t)hat would have created a certain amount of uncertainty in the minds of potential charterers*". He accepted that would have been a source of concern to many of those in the market looking to fix a VLCC at the time the Traf CP was fixed – see T3/128/22.

110. There was a second issue concerning the Vessel's SIRE status. The Vessel's SIRE Certificate had expired while she was under arrest. In order to obtain another it was necessary for the Vessel to be examined by a surveyor while discharging a cargo. Mr Eveleigh accepted that many charterers, cargo interests and port terminal operators would not accept vessels that did not have an up to date SIRE Certificate – see T3/130/4. He agreed that a vessel without such a certificate would have been at a real handicap in the market in May 2020 – see T3/130/13-14. As he volunteered in his cross examination, it was one of the first things he noticed when starting to read into this claim. He accepted too that in the absence of such a certificate the available market would be limited because the Gulf was potentially the only place where she could load without a current certificate – see T3/132/23-24. This culminated with this exchange:

> "Q: …The lack of an up-to-date SIRE report seriously limited the options and the possibilities that were available in relation to this vessel in May 2020?
>
> A. Yes. I will agree with that totally. Yes. At any time for any ship that was in that position would be hindered. ."

Finally, Mr Eveleigh accepted Mr Carrithers' statement that no external market participants were keen to charter the Vessel, which he said did not surprise him – see T3/133/9 – 24. This led him also to accept:

> "Q: …if there were no external market participants willing to charter the vessel on reasonable terms, Trafigura had little option other than to do an internal charter, would you agree?
>
> A. Yes. I think I have to agree with that and in many ways they were fortunate to have one where the SIRE report wasn't necessary
>
> …
>
> Q: You certainly haven't identified any six month period fixture available and concluded in May 2020 that you say that Trafigura should have fixed at that time rather than concluding the Traf charterparty with TPTE correct?
>
> A. Correct. ..."

111. Notwithstanding this evidence, Mr Carrithers continued to maintain that the storage element of the Traf CP did not reflect what would have been agreed by an independent ship owner negotiating at arms length with a charterer. On analysis this turned out to be a concern about a formula that left the owner taking the risk of a market fall in rates that an independent ship owner negotiating at arms length would not choose to do. The difficulty about that is it fails to take account of the commercial realities which Mr Carrithers had accepted earlier – that is that the Vessel was blighted in two respects; that the areas where the Vessel could operate were severely constrained and that "*Trafigura had little option other than to do an internal charter*…" In principle I accept that the terms agreed were ones that an independent ship owner would be reluctant to accept all other things being equal. However, that was not the position once it is accepted that the Vessel was blighted in the ways acknowledged by Mr Carrithers. This ended with this exchange:

> "Q: And you simply do not know whether there may have been the possibility of fixing externally in May 2020 on terms that would have provided a better return to Trafigura than the Traf charterparty with TPTE. Agreed?
>
> A. Yes. I agree with that and neither do I know what marketing Trafigura attempted to do with the vessel while -- at that period of time. ..."

The qualification does not assist given the concessions made in the earlier answers.

112. In my judgment these answers are entirely inconsistent with a conclusion that the Vessel could have been fixed at rates that otherwise similar vessels without these handicaps were fixing at, much less that that in agreeing the terms of the Traf CP Trafigura acted unreasonably.

113. The penultimate issue that arises concerns the treatment of port expenses at Daesan where the Vessel called for bunkers on 12 September 2020 during the storage phase of the Traf CP. Under the Traf CP,

> "BUNKERS CONSUMED WHILE ON STORAGE TO BE AT COST BASIS SUPPORTING DOCUMENTS ON A FIRST IN FIRST OUT BASIS ..."

The effect of this provision is that the charterer was required to pay for the fuel used but the responsibility for ensuring there was fuel to use was that of the disponent owner, who in consequence retained title to the fuel not used. Thus the costs and incidental expenses of providing fuel are the responsibility of the disponent owner – that is Trafigura.

114. The final issue as between Trafigura and the defendants concerns declarations in respect of costs and other expenses to be incurred or assessed principally in the Singapore proceedings and the arbitration between Trafigura and the head owners. The issue here is that Trafigura seeks various declarations concerning the obligation to indemnify in respect of those costs whereas Mr Byam-Cook maintains that to grant such declarations at this stage would be premature.

115. I agree that it would be wrong to make declarations that pre-determine whether and what sums should be recovered under the indemnities whilst at the same time it may be possible and desirable in the interest of avoiding misunderstandings in the future for declarations to be made that address matters of general principle (particularly where there is no dispute as for example limiting the costs recoverable in respect of Trafigura's costs in the Singapore proceedings and the arbitration to costs which were reasonably incurred and are reasonable in amount) whilst making provision for a further hearing if agreement cannot be reached concerning the amounts recoverable. This is likely to be an issue that can more appropriately be addressed when settling the order that should follow the handing down of the judgment. Given the cost implications of a further hearing, it may be possible to direct that any future claims arising under the indemnities can be addressed in the first instance on paper. However, I intend that a significant NDR provision should be included in any such order since these issues in practice ought not to require resolution by a court given the quality and experience of the parties' legal representation. I postpone further consideration of this issue until after hand down of this judgment.

116. I now turn to the sums claimed by CUSA from PBSA under its indemnity other than the sums already considered.

117. The first issue that arose at any rate at the start of the trial was whether Clearlake was entitled to recover its costs of intervening in the Singapore proceedings. The issue of substance appears to be whether it was reasonable for it to have done so. Mr Thomas appears to accept that this issue will have to be determined on a subsequent occasion – see paragraph 127 of his written closing submissions. It would appear therefore that this issue is one that ought to fall into the regime set out above concerning future costs but again I will hear the parties as to that following the hand down of this judgment.

118. Next there is an issue concerning the costs that Clearlake has incurred in these proceedings at the interlocutory stage. This was addressed by Teare J in The Miracle Hope (No.4) [2020] EWHC 1073 (Comm). The Judge concluded that Clearlake should recover its costs of the without notice hearing – see paragraph 52 - but concluded that PBSA should only pay 50% of the costs incurred by Clearlake in pursuing its

applications against PBSA and PBSA should not be required to pay either Clearlake's liability to pay 50% of Trafigura's costs or Clearlake's own costs in seeking to resist the order sought at the on notice hearing – see paragraph 54. The reasons for this conclusion are set out at paragraph 51 of the judgment in these terms:

> "However, when Trafigura sought additional relief on 15 April 2020 it would appear that Clearlake chose to resist the additional relief for its own reasons. It adduced considerable evidence and made its own submissions as to why the additional relief should not be granted. It did not merely say that it passed on up the line the case of Petrobras. It advanced its own case. Had it adopted the passive role of "piggy in the middle" and merely passed on arguments up and down the line its costs would have been much less than they were."

119. Mr Thomas suggested that Teare J expressly recognised the possibility of recovering the costs he had disallowed under the indemnities in paragraph 38 of his judgment – see paragraph 128 of his written closing submissions. I do not agree that is the effect of that paragraph. It is concerned exclusively with costs as between Trafigura and CSPL. Mr Thomas chose not to expand upon this submission – see T4/120/7-13. The issue was not one that was addressed by Mr Byam-Cook orally. This being so, my provisional conclusion is that the costs disallowed by Teare J should not be recovered under the indemnity. He did not disallow them on the basis they were disproportionate. Had that been the case different considerations would apply. He disallowed them on the basis that they had been unreasonably incurred. However, given the unsatisfactory basis on which this issue has been addressed, I will hear the parties further on this issue at the hand down of this judgment.

120. The final issue that arises concerns interest on sums, which CSPL alleges was borrowed by it by inter-company loan from Gunvor Singapore Pte Ltd in order to allow it to put up cash security in accordance with the interim injunction granted by Henshaw J on 24 March 2020. It is said that this was necessary in light of the uncertainty as to whether PBSA would itself comply and whether the negotiation of a bank guarantee with Natixis would prove successful. It ultimately proved unnecessary for CSPL to put up cash security, as PBSA did so just before the deadline set by the Court's Orders. The sum claimed is quantified in the sum of US$162,339.06. PBSA oppose recovery of this sum on the basis that the loan was concluded on 6 April 2020 (although stated to be "effective" retrospectively from 31 March 2020) but before both those dates, CSPL and CUSA had already obtained their own injunction from Jacobs J and, on 2 April 2020, PBSA's solicitors had confirmed that PBSA would comply with the order and put up the security. Mr Byam-Cook chose not to expand upon this issue in his oral submissions – see T5/91/4-7.

121. The email from its solicitors on which PBSA relies for this submission was dated 2 April 2020 and in these terms:

> "As I confirmed in my email of earlier today, Petrobras intends to fully comply with the Order of Mr Justice Jacobs dated 1 April 2020.

> To this end, Petrobras has instructed counsel in Singapore – Mr John Sze of JTJB – who is copied on this email together with his colleague Ms Jolene Tan.
>
> John has already written to Natixis' lawyers Rajah & Tann to discuss the security required for the release of the vessel. Additionally, I understand that Petrobras has established direct contact with Natixis' commercial team to discuss such security."

The point made by Mr Thomas in his oral submissions was that PBSA did not at that stage comply notwithstanding its expressed intention to do so. On the contrary there was an argument with Natixis about the wording of the security that led ultimately to a hearing before Teare J on 6 May – some 5 weeks after the email on which PBSA relies. This leads Mr Thomas to submit that in these circumstances it was entirely reasonable that his client should seek to place itself in a position whereby it could comply with the injunction if PBSA did not by the deadline set. I agree with this submission – the alternative would have been to run the risk of being held in contempt. The order made by Jacobs J did not discharge the order made by Henshaw J against CSPL.

122. In the result, the claims by Trafigura against CSPL and by CUSA against PBSA succeed to the extent set out above. I leave it to the parties to work out by agreement the effect of these conclusions. If there is any dispute as to the carrying into effect of these conclusions then they can be resolved at the hearing at which this judgment is handed down.