[2020] EWHC 995 (Comm)

Case Nos: CL 2020 000159 AND CL 2020 000171

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2020

Before :

MR. JUSTICE TEARE

- -

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 S.A.	**Defendant**

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Michael Ashcroft QC and **Oliver Caplin** (instructed by **Ince Gordon Dadds LLP**) for Trafigura
Robert Thomas QC and **Ben Gardner** (instructed by **Kennedys Law LLP**) for Clearlake
Henry Byam-Cook QC (instructed by **White & Case LLP**) for Petrobras

Hearing date: 22 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:30 AM Monday 27th April 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's Clerk"

Mr. Justice Teare :

Introduction

1. This is the return date in respect of two mandatory injunctions requiring a voyage charterer, Clearlake, and a sub-voyage charterer, Petrobras, "forthwith" to provide such bail or other security required to secure the release of the vessel MIRACLE HOPE from arrest in Singapore.

2. The ex parte on notice injunction issued against Clearlake was granted by Henshaw J. on 24 March 2020 and the ex parte on notice injunction issued against Petrobras was granted by Jacobs J. on 31 March 2020. Their respective judgments are [2020] EWHC 726 (Comm) and [2020] EWHC 805 (Comm).

3. The disponent owner who sought the injunction from Henshaw J. was Trafigura who had time chartered the vessel from its registered owner, Ocean Light. That injunction was issued against Clearlake who in turn sought an injunction from Jacobs J. against the sub-charterer.

4. The injunctions were granted pursuant to a clause which was found in both voyage charters in identical form:

> "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 …
>
> then Owners shall discharge such cargo in accordance with Charterers' instructions in consideration of receiving an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs". Following indemnity deemed to be given by Charterers on each and every such occasion …….
>
> (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 have not received all such original bills by 24.00 hours on the day 13 (thirteen) calendar months after the date of discharge, then this indemnity shall terminate at that time…

> (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."

5. That clause was activated when Petrobras required the cargo of crude oil on board the vessel to be delivered without production of the bills of lading in November 2019. It is common ground (for the purposes of this application) that the form of indemnity required by the International Group of P&I Clubs and which applied in the present case was in these terms:

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

6. In March 2020 a bank, Natixis, which had paid for the cargo under a letter of credit but had not received the cargo, arrested the vessel in Singapore in support of a claim for damages for breach of the shipowner's obligation to deliver the goods against

production of the bills of lading. It claims damages of a little over US$76 million, essentially, the value of the cargo of oil. That arrest led to the proceedings in this court seeking mandatory injunctive relief to enforce the provisions of the above indemnity. This court has jurisdiction in this matter because of the choice of jurisdiction clause in both charterparties. Mandatory injunctive relief was issued by this court because it has been recognised for some time that such relief is appropriate to enforce the obligation to provide such bail or other security as may be required to secure the release of a vessel from arrest; see *Harmony Innovation Shipping Ltd v Caravel Shipping Inc* [2019] EWHC 1037 (Comm) at §30; *The Bremen Max* [2009] 1 Lloyd's Rep 81 at §12; and *The Laemthong Glory (No.2)* [2005] 1 Lloyd's Rep 632 at §§51-52.

7. The order made by Henshaw J. provided as follows:

> "The Defendant must provide forthwith such bail or other security as may be required to prevent such arrest or detention or to secure the release of the vessel. For the avoidance of doubt, the Defendant is required to provide the aforementioned bail and/or security directly to the Bank"

8. The order made by Jacobs J. provided as follows:

> "The Defendant must provide forthwith such bail or other security as may be required to secure the release of the Vessel, or if such bail or other security has already been provided by another party, to provide forthwith such substitute security to replace security that may have been provided by another party to secure the release of the Vessel. For the avoidance of doubt, the Defendant is required to provide the aforementioned bail and/or security directly to the Bank."

9. Following the grant of the injunctions both Clearlake and Petrobras sought to comply with the injunctions. However, they have failed to reach agreement with Natixis as to the terms of the bank guarantee required to secure the release of the vessel from arrest.

10. Thus on the return date, 22 April 2020, the position was that the vessel remained under arrest notwithstanding the issue of injunctive relief by this court. There is no dispute that injunctive relief should remain in place. However, Trafigura (and therefore Clearlake) have sought an amendment to the terms of the order. The amendment sought was set out in a draft order but was amended orally during the hearing before me, without a revised form of draft order being provided in writing. The aim of Trafigura is to give greater precision to the order by identifying the date by which action must be taken and describing the action which must be taken. Thus counsel for Trafigura sought an order which required Clearlake to provide, by 24 April 2020 (two days after the hearing), a bank guarantee in the form required by Natixis, failing which there should be a payment into the Singapore Court within 7 working days of the security demanded, some US$76 million.

11. Clearlake resisted any variation to the injunction, but, if it is to be varied, seeks the same variation against Petrobras. Petrobras not only resisted any variation but also protested at the lack of notice given of the proposed variations. However, although the notice given was late Petrobras (and Clearlake) were able to provide evidence in

response and to make detailed submissions. Although I accept that they ought to have had more notice than they were given the matter has been fully argued and it would in reality be an unnecessary delay to adjourn the application for a variation of the injunctive relief to a later date.

12. The hearing before this court, as a result of the Covid 19 pandemic, took place remotely with the judge and counsel using a video link from their homes. The solicitors and other interested parties, such as the registered owners, viewed the proceedings remotely. I am grateful to the parties for their cooperation in enabling the hearing to take place in that manner and for my clerk in setting up the necessary links. Electronic bundles were provided and the hearing was completed within a day.

Issues of construction

13. The amended order sought by Trafigura raises two questions of construction. The first is the meaning of the word "forthwith" in the mandatory injunctions issued by this court. The second is the meaning of the phrase "bail or other security as may be required …to secure the release" of the vessel which is also to be found in the mandatory injunctions issued by this court and repeats the language of the letter of indemnity required by the International Group of P&I Clubs.

"Forthwith"

14. The use of that word in the injunction indicates that the action required to be taken must be taken, at the least, with some urgency. That is not surprising since the purpose of the obligation to furnish security is to prevent loss caused by the detention of a vessel under arrest. That is consistent with the facts of this case with regard to which Henshaw J. noted that there was "clearly a very pressing need for the security to be provided in order to secure its [the vessel's] release". Although a dictionary definition of forthwith is "immediately, at once, without delay or interval" it would be unrealistic to construe "forthwith" as meaning instantaneously. The provision of security will inevitably take a little time, even assuming cooperation on all sides. Moreover, I was referred to *Halsbury's Laws of England* vol.22 at paragraph 292 which states

> Where the contract provides that it is to be performed 'as soon as possible' or 'forthwith' or uses similar expressions, the particular stipulation will be construed by reference to what is reasonable in the circumstances. What is a reasonable time in a particular case is a question of fact. Words such as 'immediately' or 'directly' import a more stringent requisition than is ordinarily implied by 'reasonable time'.

15. I was also referred to *The Interpretation of Contracts* by Lewison, 6th ed. which stated at section 10 as follows:

> Where something is to be done "forthwith" or "as soon as possible" it is to be done in the shortest practicable time having regard to the circumstances surrounding the making of the contract.

16. In my judgment the word "forthwith" in the present context envisages that the security will be provided in the shortest practicable time. What is practicable will inevitably depend upon the circumstances of the case.

17. There was evidence of a debate before Henshaw J. as to whether the injunction granted should use the term "forthwith" or whether some looser formulation should be used such as within a reasonable time, or the use of best endeavours. Henshaw J. decided to use the word "forthwith". It was suggested that the fact that that debate took place and was resolved by Henshaw J. should inform my understanding of the meaning of "forthwith". However, there was no evidence of Henshaw J's reasoning (though I was told that he relied upon the phrase "on demand" in the indemnity) and in any event such debate did not involve Petrobras. I consider that I should seek to construe "forthwith" by reference to the meaning it reasonably bears in the context in which it is found. That is the meaning I have described in the previous paragraph.

"Bail or other security as may be required …to secure the release of the vessel"

18. It appears to be Trafigura's contention that the phrase "as may be required" means that Clearlake must do whatever it takes to secure the release of the vessel. "It is to put up security, full stop." Consistently with that submission the order now sought provides that "the Defendant is required to provide the aforementioned bail and/or security directly to the Bank in cash and/or any other format agreeable to the Bank" (emphasis added). Thus, the submission is, I think, that whatever the Bank requires must be provided.

19. By contrast it is Clearlake's contention that the phrase "as may be required" refers to the security which is required by the court of the forum of the arrest to permit release. This is said to reflect Article 5 of the Arrest Convention 1952 which provides for the court in whose jurisdiction the vessel has been arrested to determine *"sufficient bail or other security"*

20. In response Trafigura submitted that it is this court which "has exclusive jurisdiction over the question as between Trafigura and [Clearlake] of whether, how, and when security should be provided by [Clearlake]".

21. The phrase to be construed comes from the standard P&I Club wording which the parties agree (for the purposes of this application) was the basis of the demand for security. Obviously, the wording of the injunction was intended to track the wording of the agreed indemnity.

22. There appear to me to be at least three possible meanings of the phrase "as may be required". First, it may mean as may be required by the arresting party to secure the release of the vessel from arrest. Second, it may mean as may be required by the court of the place of arrest to secure the release of the vessel from arrest. Third, it may mean as may be required by the court which the parties have agreed has jurisdiction to determine disputes arising under the charterparty.

The first suggested meaning; as may be required by the arresting party

23. In most cases there will obviously be discussions with the arresting party as to what security is acceptable and so long as its demands are not unreasonable it is to be

expected that security acceptable to the arresting party would be provided. In cases of this nature guarantees from first class banks will usually be offered and accepted. P&I Club letters would not be usual in this class of case because those who request cargo to be delivered otherwise than against production of bills of lading are likely to be cargo interests, not shipowners who are members of a P&I Club. But if the arresting party's demands as to the form of the guarantee are unreasonable is the charterer obliged to provide security which complies with those demands? On the one hand it can be said that, as between the owner and the charterer, it is the latter who should take the risk of unreasonable behaviour by the arresting party because it is the charterer's request that delivery be made otherwise than against the presentation of a bill of lading that has given rise to the problem. But on the other hand it can be said that clear words are required to oblige the charterer to comply with an unreasonable demand and there are no such clear words.

The second suggested meaning; as may be required by the court of the place of arrest

24. Where there is a dispute between the arresting party and the charterer as to the security required for the release of a vessel from arrest such dispute would ordinarily be resolved by the court of the place of the arrest. That is because the court of the place of arrest is the court which has authorised the arrest and only it has the power to release the vessel from that arrest. Where there is a dispute as to the reasonableness of the security offered to secure the release of the vessel from arrest the vessel will only be released if the court of the place of arrest considers the security sufficient. The 1952 Arrest Convention, article 5, reflects this. The court would consider whether the security offered provided the claimant in rem with adequate security for its claim.

25. I am mindful that the phrase "as may be required" also refers to the case where an arrest is feared. But in such a case, at any rate in England, a caution (formerly a caveat) against arrest may be lodged with the court. In England the cautioner must undertake to give sufficient security; see CPR 61.7. The court would obviously have to resolve any dispute as to the sufficiency of the security. It seems likely that such procedures are available in other jurisdictions where admiralty arrests are available.

26. In my judgment there is a powerful case that the meaning which the phrase "as may be required" would convey to a reasonable person having knowledge of the context is that it refers to the security required by the court of the place of arrest to release the vessel from arrest.

The third suggested meaning; as may be required by the court with jurisdiction to determine disputes between the owner and charterer

27. In circumstances where the owner and charterer have agreed to this court having jurisdiction to determine disputes relating to the indemnity such jurisdiction would surely include a dispute as to the adequacy of the security required by the undertaking. Counsel for Trafigura has emphasised that one must not elide the position between Natixis and Clearlake in Singapore and the position between Trafigura and Clearlake in this court. It is this court which has, submits counsel, jurisdiction over the question as between Trafigura and Clearlake of whether, how, and when security should be provided by Clearlake.

28. I accept that this court has jurisdiction as between Trafigura and Clearlake to determine the meaning of the phrase "as may be required". That is what this application requires this court to do. Exercising that jurisdiction I have concluded that the meaning which the parties, as reasonable men, would have understood the phrase "as may be required" to bear is "as may be required" by the court of the place of arrest. That appears to me to be the meaning which best reflects the context in which the phrase is found and the purpose of providing security. What the court of the place of arrest requires in any particular case is a question of fact for this court to determine as between owner and charterer.

Interaction between (a) the court with jurisdiction to determine disputes between the owner and charterer and (b) the court of the place of arrest.

29. In normal circumstances an Admiralty Court, faced with an application to release a valuable vessel from arrest, would determine whether the security offered was such as to allow the release of the vessel from arrest without delay. In such circumstances there would usually be no need for the court upon which the owner and charterer have conferred jurisdiction to determine disputes between them to find as a fact what security would be judged adequate by the court of the place of arrest to allow the release of the vessel from arrest. For that would in practice be determined by the court of the place of arrest.

30. But these are not normal circumstances. There is a worldwide Covid 19 pandemic which has disrupted normal life, including the justice system. As a result I was told that the court in Singapore is not able to hear the application to determine the adequacy of the security offered until 18 May 2020. In those circumstances the question arises, or may arise, whether this court should find as a fact whether the security which has been offered to secure the release of the vessel matches that which would be required by the court of the place of arrest or not. That is what this court would have to do, and would have jurisdiction to do, if, unusually, there was no appropriate application before the court of the place of arrest. Those are not the circumstances of this case. There is an appropriate application in Singapore but the result will not be known for almost a month.

31. In those circumstances it is said that comity, that is, the respect which this court has for the procedures of other courts, requires this court to decline to answer that question. There is sense in that approach. For otherwise awkward situations might result. Security considered appropriate by this court may not be considered appropriate by the court of the place of arrest, in which case the vessel would not be released. That seems unlikely to have been intended by the parties. Conversely, if security offered by the charterer were considered inadequate by this court but met with the approval of the court of the place of arrest it would be odd if the charterer had to provide more than the court of the place of arrest required to enable the vessel to be released.

32. But on the other hand there is a dispute between the owner and charterer. The charterer owes an obligation to the owner to provide security which will secure the release of a valuable vessel from arrest. The owner wishes to enforce that obligation and so to mitigate the losses it is suffering by reason of its inability to trade the vessel. There is therefore a powerful reason for this court, in circumstances where the court of arrest, for understandable reasons, is unable to determine the application for release until 18

May 2020, to exercise the jurisdiction the parties have conferred on it to resolve disputes between owner and charterer.

The response of Clearlake and Petrobras to the injunctions

33. The steps taken by Clearlake to comply with the order of Henshaw J. issued on 24 March 2020 were described by Mr. Thirupathy of Kennedys Singapore in his second witness statement dated 15 April 2020. The steps taken by Petrobras were described by Mr. Sze Kian Chuan of Joseph Tan Jude Benny LLP in his witness statement dated 20 April 2020. In addition I was referred by counsel to selected extracts from the extensive communications between the parties.

34. Immediately following the order of Henshaw J. Clearlake instructed Allen & Gledhill to liaise with Natixis' solicitors, Rajah & Tann, about the provision of security to release the Vessel from arrest. Corina Song of Allen & Gledhill spoke to Toh Kian Sing of Rajah & Tann on 26 March 2020 and followed up with an email requesting Natixis' security requirements.

35. There were a number of sticking points between Clearlake and Natixis that were preventing security from being finalised. One concern that Clearlake had (and have) is that any security that it provided should be capable of being substituted by Petrobras' security, so as to protect Clearlake's intermediate position and to enable the order of Jacobs J. requiring Petrobras to provide substitute security to be effective. Natixis' position was that it would only agree to substitute security on identical wording issued by a Singapore bank, which was problematic because different banks have their own preferred wording and there was a risk that Petrobras would be unable to obtain a guarantee in identical wording to that put up by Clearlake's bank. Natixis also wanted an 'evergreen' bank guarantee from a Singapore bank with no expiry date, which was not a type of guarantee that Clearlake understood to be commercially available. Natixis further wanted the bank guarantee to respond to a judgment from a court other than the Singapore courts. This was a difficult issue because Clearlake understood that Singapore law does not allow the Singapore admiralty jurisdiction to be invoked in aid of foreign court proceedings or judgments. Clearlake was concerned about a guarantee that would respond immediately to a settlement agreement between Natixis and Ocean Light, in circumstances where Ocean Light would have no financial interest in the settlement and thus no interest in defending the claim or negotiating a reasonable compromise. Despite these concerns Clearlake believed that it would be possible to negotiate security that was reasonably acceptable to Natixis, Clearlake's bank OCBC and to Clearlake itself and so negotiations continued into April 2020.

36. By 1 April 2020 Petrobras was under an equivalent obligation under the order of Jacobs J. to provide security to Natixis. On 2 April 2020 Kennedys wrote to Rajah & Tann to notify them of the terms of the Petrobras Order and to propose that they liaise directly with Petrobras' solicitors, White & Case. Kennedys also wrote to White & Case attaching the latest draft guarantee wording provided by Rajah & Tann on 1 April 2020 and calling on Petrobras to finalise a guarantee with Natixis that could secure the Vessel's release, in accordance with the order of Jacobs J. Negotiations continued between Rajah & Tann and Allen & Gledhill because it was not yet clear whether Petrobras would, in fact, comply with its own obligations under the Petrobras Order. On 2 April 2020 Kennedys received a message from White & Case confirming

that Petrobras intended to comply fully with the terms of the order of Jacobs J. On 3 April 2020 John Sze of Joseph Tan Jude Benny (JTJB) informed Kennedys that he was the Singapore lawyer acting for Petrobras and would be negotiating with Rajah & Tann on Petrobras' behalf. Kennedys then sent an update to JTJB and to White & Case of the exchanges between Rajah & Tann and Allen & Gledhill culminating in Clearlake's latest offer of security.

37. On 3 April 2020 the lawyers acting for Natixis advised the lawyers acting for Petrobras that a parent guarantee was not acceptable and that security could be provided by a bail bond, P&I Club letter of undertaking, bank guarantee or payment into court.

38. Kennedys sent chasers to JTJB and White & Case on 4 and 5 April 2020 calling on Petrobras to put up the security directly or to confirm that it would put up substitute security. JTJB responded on 5 April 2020 stating that they were in negotiations with Rajah & Tann directly.

39. On 5 April 2020 Clearlake, having itself reached an impasse with Rajah & Tann as to the terms of the security required to secure the release of the Vessel, applied on an urgent basis to intervene in the Singapore arrest proceedings, with a view to applying for the Singapore Court to determine the terms of the security required to release the Vessel.

40. On 5 April 2020 Petrobras offered a bank guarantee. Rajah & Tann responded to Petrobras' proposed guarantee wording on 6 April 2020, noting that it was in largely the same form as Clearlake's proposed guarantee wording and taking issue with that wording.

41. Amongst others, three reasons were cited. (1) There was a possibility of an arbitration before an arbitral tribunal or another court of a competent jurisdiction. (2) The renewal mechanism stated in the Petrobras proposed bank guarantee was unheard of and untested. (3) There was no basis for Petrobras to be part of any settlement between Natixis and Ocean Light.

42. In the interest of trying to continue the discussions and to provide the bank guarantee as soon as possible, on 7 April 2020 Petrobras agreed to keep the wording in paragraph 1 of R&T's proposed Bank Guarantee in relation to the possibility of resolution of the issue before an arbitral tribunal or another court of a competent jurisdiction. Furthermore, Petrobras counter-proposed an extension mechanism, which was previously negotiated and agreed to by Natixis Netherlands. This was offered because an auto-renewal mechanism (as demanded by Natixis) would not be acceptable to any of the banks that Petrobras has approached to provide the bank guarantee.

43. Also on 7 April 2020 Clearlake applied for an order that security be put up in the form proposed by Clearlake to release the Vessel and that substitute security may be put up by Petrobras. In a supporting affidavit Mr Alan Ong of Clearlake explained Clearlake's difficulty in agreeing security with Natixis and identified what Clearlake considered to be unreasonable security demands made by Natixis that were preventing the security from being agreed:

    a) The requirement that the guarantee respond to the judgment of any competent court and not just that of the Singapore Court;

b) The refusal to allow for Clearlake to be a party to any settlement between Natixis and Ocean Light;

c) The requirement for a warranty from Clearlake that the Vessel was not on demise.

44. On 8 April 2020 Natixis' lawyers suggested that Petrobras pay the security amount into court and thereafter apply for substitute security to be provided or "put up security by way of a Bank Guarantee on the wording required by our client under protest. Thereafter, the Court, by way of Clearlake's application in HC/SUM 1638/2020 (as well as your intervention in the same), can deal with the matter thereafter."

45. On 9 April 2020 leave for Clearlake to intervene was granted. Allen & Gledhill on behalf of Clearlake then wrote to the Singapore Court Registrar to request that the application in relation to terms of the security and the release of the Vessel be heard earlier than the preliminary hearing date of 20 May 2020 because of its urgency. On 10 April 2020, Petrobras intervened in the Singapore arrest proceedings. In an affidavit from Pedro Barroso of Petrobras dated 10 April 2020 Petrobras stated that it had "significant difficulty" reaching agreement of sensible and reasonable security wording with Natixis and sought the Court's assistance compelling Natixis to accept the proposed wording that Petrobras was willing to offer (which was in the same form as that proposed by Clearlake in its application).

46. As to the settlement aspect, on 10 April 2020 Petrobras informed Natixis that given Petrobras's interests in the matter, Petrobras would not be able to agree to a mechanism that would allow Natixis to call on the security provided by Petrobras solely on the basis of a settlement between Natixis and Ocean Light. The proposal for an extension mechanism in place of the auto-renewal mechanism was rejected by Natixis on 12 April 2020.

47. The Registrar in the Singapore proceedings directed on 14 April 2020 that Petrobras should file any application for the provision of security and release of the Vessel by 17 April 2020 and that Natixis should respond to Clearlake's application and Petrobras' application by 24 April 2020. Clearlake and Petrobras were to respond by 30 April 2020 and the applications were to be heard on 6 May 2020. As noted above the hearing date has now been postponed until 18 May 2020 as a result of the disruption caused by the COVID 19 pandemic.

48. On 16 April 2020 Petrobras proposed a 3-year term for the bank guarantee to resolve the extension aspect of the deadlock.

49. A reply was received on 22 April (the day of the hearing in this court) which stated that Natixis did not see anything in the email of 16 April 2020 that merited a reply.

50. Thus, so far as the negotiations between Clearlake and Natixis and between Petrobras and Natixis with regard to the form of a bank guarantee are concerned the parties appear to be at an impasse which Clearlake and Petrobras seek to resolve by a decision of the Singapore Admiralty Court. I have not seen the proceedings in that court but I assume that the nature of the application is an application for the release of the vessel from arrest upon the basis of the bank guarantees offered by Clearlake and Petrobras which they say provide adequate security for the claim in rem advanced by Natixis against the vessel. It would appear to be

an application analogous to that provided in this jurisdiction by CPR 61.8(4); see *Stallion Eight Shipping v Natwest Markets* [2018] EWCA 2760 at paragraphs 21, 28 and 45.

51. Counsel for Trafigura complained that Clearlake was "dragging its feet, and otherwise engineering a situation of delay in the hope that it will never need to put up security". I was not persuaded that that was a fair conclusion to draw from the evidence. There may be, as I shall discuss, other steps which Clearlake and Petrobras could have taken (namely, payment into court) but they both appear to have made genuine and sincere efforts to provide security.

52. Counsel for Trafigura also submitted that the present position is as follows. Of the three principal difficulties identified by Mr. Ong of Clearlake (i) the requirement that the guarantee respond to the judgment of any competent court and not just that of the Singapore Court; (ii) the refusal to allow for Clearlake to be a party to any settlement between Natixis and Ocean Light; and (iii) the requirement for a warranty from Clearlake that the Vessel was not on demise) only one remained, the settlement issue. That submission was made on the basis that according to Petrobras, Petrobras and Ocean Light have agreed, in principle, to agree to Singapore Court jurisdiction for the claim brought by Natixis against Ocean Light (which would eliminate the jurisdiction problem) and Ocean Light has confirmed in writing that the Vessel was not demised chartered at the material time (so that issue no longer exists). I am not persuaded that that evidence means that Petrobras and Natixis are agreed on those matters. It may be that in circumstances where Ocean Light has confirmed in writing that the vessel was not demise chartered that that can no longer be a point of difficulty but I have seen no evidence that Petrobras and Natixis are agreed that Natixis' claim be decided by the Singapore Court and not by another court. That is certainly the position of Petrobras (see its email of 16 April 2020 at paragraph 3). I cannot discern from Natixis' reply of 22 April 2020 that that is acceptable to Natixis.

53. Counsel for Trafigura went on to submit that the third objection, which he accepts is unresolved, the settlement issue, is not a problem for Clearlake's bank. This is based upon the circumstance that Mr. Thirupathy in his third witness statement dated 17 April 2020 mentioned that Clearlake's bank required the no demise charter warranty but did not mention that the bank also objected to the jurisdiction or settlement issues. It was therefore suggested that there was no obstacle to Clearlake's bank giving a guarantee which was acceptable to Natixis. I am not persuaded that this is or was the case. It seems to me unrealistic to suppose that Clearlake's bank would be willing to agree the jurisdiction and settlement issues in circumstances where its client is so set against them.

54. Counsel for Trafigura also submitted that the demand for an "evergreen" bank guarantee was not an obstacle to Clearlake providing a bank guarantee because it was not one of Mr. Ong's three difficulties. Reference was also made in counsel's oral reply to an exchange on 3 April which suggested that Natixis and Clearlake were close to agreement on the issue. However, there is evidence that there remains a demand for an evergreen bank guarantee and that no bank has been found willing to provide such a guarantee. Although Mr. Ong did not list it in the passage relied upon by counsel it seems clear that if, as appears to be the case, Natixis is unwilling to accept Petrobras' constructive three year offer, it was and remains an obstacle as between Natixis and Clearlake just as it is between Natixis and Petrobras. (After the hearing I was told that Natixis have confirmed their demand for an evergreen guarantee.)

The requested variation that Clearlake/Petrobras provide a bank guarantee in the form required by Natixis by 24 April 2020 (or, I assume, within two days of judgment being handed down).

55. Whether or not this variation can properly be ordered depends upon whether (following my conclusion on the question of construction) a bank guarantee in the form required by Natixis is in the form which the Singapore Admiralty Court would require to permit the release of the vessel from arrest.

56. So far as the jurisdiction issue is concerned Mr. Thirupathy has said that

> "there is an established principle of Singapore law that the Singapore admiralty jurisdiction may not be invoked in aid of foreign proceedings, which appears to be the effect of Natixis' demand that the security respond to foreign judgments. Accordingly, the breadth of the security demand is unjustified in the forum of the arrest and [Clearlake] cannot be required to procure a guarantee in that form."

57. So far as the settlement issue is concerned Mr.Thirupathy has said that Clearlake's

> "requirement is reasonable because otherwise Natixis and Ocean Light would be able to settle the claim in circumstances where Ocean Light had no interest in the outcome of the litigation: Clearlake would be required to pay the settlement sum through the guarantee mechanism, even if it was not a reasonable settlement sum. The bail form in the Rules of Court only requires the security to answer to a judgment or a settlement made between the solicitors of the parties to the proceedings (which includes Clearlake as an intervener) that is filed in Court. Therefore, Natixis is again demanding more than it is entitled to under Singapore law."

58. These are the matters to be debated before the Singapore Admiralty Court on 18 May 2020. I am reluctant, on the grounds of comity, to express this court's views on those matters which appear to be matters of Singaporean law or practice. But in any event there is no evidence before me that the Singapore Court would require the bank guarantee to respond to the judgment of a foreign court. The evidence before me is that it would not. With regard to the settlement issue there is much to be said for Clearlake's view that it would be unreasonable for the guarantee to respond to a settlement to which it was not a party. No submissions were made to me to the effect that a guarantee which responded to a settlement to which Clearlake/Petrobras was not a party would be required by the Singapore Court. In these circumstances I would not be able to make the necessary findings of fact required by Trafigura even if this court were, in the particular circumstances of this case, untroubled by issues of comity.

59. It will be recalled that Natixis' lawyers suggested on 8 April 2020 that a bank guarantee on their terms could be provided under protest so that the Singapore court could thereafter determine the issues between the parties. It was not explained how this fitted in to the (yet to be drafted) requested variation of the injunction. I assume that what is suggested is that the bank guarantee be issued on Natixis' terms but under protest.

60. In support of that suggestion I was shown evidence from Mr. Teo, another Singapore lawyer, that

> "where there is disagreement on a party's entitlement to security, security can be put up under protest in order to procure the release of the vessel first, and for the dispute on security to be determined later. Therefore, in principle, Clearlake could have put up security by way of a Bank Guarantee on the terms proposed by Natixis under protest, and applied later to moderate the quantum of the security or modify the terms of the security."

61. I was also shown a textbook on *Admiralty Law and Practice* 3rd.ed. by Toh Kian Sing SC at pp.216-7 which suggested, based upon certain Singaporean authorities, that the court might have an inherent jurisdiction to "interfere" with the terms of a guarantee where a claimant has acted oppressively towards a defendant.

62. By contrast Mr. Thirupathy at paragraph 12 of his third witness statement queried how that could work with a guarantee which was irrevocable. Mr. Sze, Petrobras' lawyer in Singapore, gave evidence that

> "theoretically, if there is a disagreement between parties as to the security wording, it might be possible to put up a bank guarantee wording required by the arresting party under protest, and subsequently seek the court's review and amendment to the bank guarantee wording. However, there is no example that I am aware of where this has been achieved by a party in Petrobras' position (I also note that no example is cited in the textbook extract exhibited to Mr Ian Teo Ke-Wei' statement). Mr Ian Teo Ke-Wei refers to the case of *The Evmar* but that was a case concerned with a P&I Club LoU, and where the owner put up the security without prejudice to its right to seek to set the arrest aside. That is not this case here. Further, as a matter of practicality, where the banks are not agreeable to the bank guarantee wording proposed (as is the case here), it is simply not possible to tell the bank to first provide the bank guarantee wording required by the arresting party "under protest", and then have the wording reviewed thereafter."

63. In this jurisdiction CPR 61.5(10) provides that "where an in rem claim form has been issued and security sought, any person who has filed an acknowledgment of service may apply for an order specifying the amount and form of security to be provided. *Admiralty Jurisdiction and Practice* 5th.ed by Meeson and Kimble notes at paragraph 4.79 that "this is a new departure as previously the court had no control over the form of the security to be provided, only as to the amount".

64. Whatever the legal position is in Singapore (on which I have received, after the hearing, the result of further research by Clearlake's Singapore lawyers which revealed no reported case of the Singapore Court varying the terms of a bank guarantee put up under protest) it seems to me that Mr. Sze's last point has force. I would be very surprised if a bank could be persuaded to put up a guarantee under protest in a form to which it objected. For if the protest failed it would then have to honour a guarantee which it had never wished to provide

and could not be compelled to provide. The suggestion of issuing a bank guarantee under protest therefore appears to me to be unrealistic, even assuming the suggested legal procedure is available. For this reason I do not consider that the suggested option of issuing a guarantee under protest assists Trafigura's application to vary the injunction.

65. The more sensible, and more practicable course, is for an application to be made for the release of the vessel against the provision of the guarantee which the bank is willing to give. If the court considers that the guarantee provides adequate security then the vessel will be released against the provision of the proffered guarantee. If the court considers that the guarantee does not provide adequate security then the vessel will not be released and the guarantee will not be provided. That is in effect the application which Clearlake has made in Singapore and appears to me to be the appropriate way of obtaining the court's ruling on the question whether the proposed guarantee provides adequate security.

66. For these reasons I am unable to make the suggested variation to the injunctions concerning the provision of a bank guarantee on the terms acceptable to Natixis.

Payment into court

67. Payment into court is another means of providing security. The obligation of Clearlake and Petrobras pursuant to the respective injunctions was to "provide forthwith such bail or other security as may be required ……..to secure the release of the vessel." It was apparent in early April that Natixis, Clearlake and Petrobras were unable to agree upon the terms of bank guarantee. That was why Clearlake, and later Petrobras, made an application to the court in Singapore. The question which arises is whether at that stage (or, at the latest, when it was apparent that there would be delay in the Singapore Court dealing with the application by reason of the Covid 19 pandemic) it was the obligation of Clearlake and Petrobras to pay the sum demanded into court by way of security. That they should do so was suggested by Natixis on 3 and 8 April 2020.

68. Given that the aim of the P&I Club undertaking is to ensure that the shipowner is not exposed to the loss necessarily caused by being unable to trade the vessel whilst it is under arrest or that such losses are kept to a minimum the charterer who gives the undertaking must be expected to provide security, not just by means of a bank guarantee, but, if a bank guarantee cannot be swiftly provided, by other available means. Payment into court is the obvious alternative. It may be unusual (Mr. Sze Kian Chan has said that it is "rarely used") but then the COVID 19 pandemic which has prevented the Singapore Court from considering the terms of the bank guarantee as promptly as it would wish is unprecedented. The charterer may not wish to incur the cost of paying a sum into court, particularly, a sum of US$76 million. But the charterer is hardly in a position to complain of having to do so since it is the charterer who instructed the shipowner to discharge cargo otherwise than against presentation of a bill of lading and so exposed the shipowner to the risk of arrest.

69. There is no cogent evidence that Clearlake is unable to pay such a sum into court. Mr. Thirupathy has given this evidence:

> Putting up cash as security is simply not practical or realistic. The security demanded is US$76m, which is not an amount of cash that a chartering company can be expected to have on hand. CSPL has confirmed that is not in a position to put up cash in this amount and would require more than 3

> business days to arrange funding of this amount, if it is possible at all. Payment into Court is also not entirely straightforward. CSPL would need to file and obtain a sealed direction to the Accountant-General for payment in (which would ordinarily take 1 to 3 days, but may take longer during the current pandemic). Next, CSPL would need to procure the payment in, which as I say would not be possible in 3 business days if it is possible at all. Third, CSPL would need to file a notice of payment-in, which should not take long, but subject to the same caveat regarding the pandemic.

70. This is not evidence that Clearlake lacks the means to make the requisite payment into court. If the payment in of US$76 million had been beyond the means of Clearlake it is to be expected that that would have been said in clear terms, supported by appropriate financial documents. It was not.

71. Mr. Sabharwal QC of White and Case has said this on behalf of Petrobras:

> "Furthermore, I am instructed by Petrobras that in light of Petrobras being a State-owned enterprise with strict controls in relation to making substantial overseas payments, if Petrobras were ordered to make a cash payment of the entire amount of the security, Petrobras would require 7 business days to comply with internal procedures, receive the necessary approvals and make the overseas payment."

72. Thus it is very likely that the appropriate payment into court could be made by Clearlake and Petrobras, however much they would prefer not to.

73. A point was raised that according to the Singapore rules of court it may not be possible for an intervener such as Clearlake/Petrobras to make a payment into court. This is said to be "at least questionable". But it seems to me most unlikely that the Admiralty Court in Singapore is unable to accept a payment into court of a sum to stand as security for the release of a vessel from arrest, where that sum is paid by a charterer pursuant to a standard indemnity on the terms of the International Group of P&I Clubs.

74. In those circumstances, in order to ensure that the court's injunctions are effective and achieve their aim, it is, in my judgment, appropriate to order that the required payment into court be made. Counsel for Trafigura accepted that a reasonable time should be provided for this to be effected and suggested 7 working days, consistent with Petrobras' evidence. Counsel for Petrobras said that additional days should be allowed to take account of the formalities noted in Clearlake's evidence. There seemed to be force in the reply of counsel for Trafigura who said that those formal steps could be taken or at least put in train whilst the sum was being obtained and made ready for payment in. I shall allow 8 working days from the date on which this judgment is handed down. That will require payment in by 7 May 2020, which is some 11 days before the Singapore Court is scheduled to consider the adequacy of the proposed guarantees or perhaps two weeks before judgment is given, if judgment is reserved.

75. It was said on behalf of Petrobras that the appropriate course was to continue the injunction in its existing form which Petrobras was willing to do. However, in the

present case the injunction has not achieved its intended purpose and the variation which is sought regarding payment in to court is designed to achieve that purpose. The proposed variation does not go beyond that to which Trafigura is entitled under the indemnity. Nor does the proposed variation go beyond the terms of the injunction. The proposed variation provides in effect for security by way of payment into court forthwith, that is, in the shortest practicable time. Considered as of today, 8 working days from the date of hand down, or 7 May 2020, is the shortest practicable time.

76. It was also said that Natixis may be unwilling to agree to the release of the vessel as a result of a payment in. I have since been informed that Natixis have indeed objected to payment in. This is surprising in circumstances where Natixis had suggested a payment in. But in any event it is the court which releases the vessel, not Natixis.

Provision of defence funds

77. The injunctions also required Clearlake/Petrobras "upon a demand to do so from Head Owners, …….to supply directly to Head Owners sufficient funds to defend any proceedings brought by Natixis against Head Owners in connection with the delivery of the Cargo." This order mirrored a provision of the standard form of indemnity required by the International Group of P&I Clubs.

78. There is no dispute that a demand was made on 31 March 2020 for one-third of the head owners' anticipated costs of $250,000, namely $83,333. This has not been paid by either Clearlake or Petrobras. Petrobras took the lead on this and offered $40,000 (to the close of pleadings) whilst seeking to negotiate an arrangement whereby they took over conduct of the defence and thereby paid for it.

79. There is room for debate as to the meaning of a demand of sufficient funds; see *The Songa Winds* [2018] EWHC 397 (Comm) at paragraphs 77-78. However, in the present case I do not consider that it can fairly be suggested that a demand for $83,333 to fund the head owner's defence of the claim brought against it in Singapore for the wrongful delivery of a cargo of crude oil worth $76 million can be said to be an unreasonable demand for sufficient funds to defend the claim. I understand why Petrobras wish to take over the defence of the claim but, so long as that offer has not been accepted, Petrobras' willingness to take over the defence does not equate to satisfaction of the demand for $83,333. It ought therefore to have been paid. That was what the injunction required. The variation sought requires this sum to be paid by 24 April 2020 which was two days after the hearing. I was not told that there was any particular urgency associated with this particular payment or any particular difficulty in making it.

80. In my draft judgment I indicated that the court would order that this sum be paid within 3 working days of the date on which this judgment is handed down. I was then asked by counsel for Petrobras to extend that period to 7 working days. Reliance was placed on evidence that such time was required for "substantial overseas payments". I am surprised that $83,333 counts as a "substantial" payment for this purpose and indeed the evidence did not state that it did. In the circumstances I shall extend the period to 4 working days. I have noted that counsel for Trafigura submits that Clearlake should provide the sum within 3 working days since there is no evidence of difficulty on its part. But it would, I think, be sensible to keep the obligations "back to back" since the underlying obligations are "back to back".

Conclusion

81. For the reasons I have endeavoured to explain (at some haste, as required by the circumstances) the court shall not order that a bank guarantee shall be provided in the form required by Natixis. The Court shall however order payment in to the Singapore Court of the sum demanded as security, some $76 million, within 8 working days. The court shall further order the payment of defence funds of $83,333 to the head owners within 4 working days. These orders will be made in both actions. I shall ask counsel to draw up the orders necessary to give effect to this judgment.