



Neutral Citation Number: [2021] EWHC 3132 (Comm)

Case No: CL-2020-000796

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

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

Date: 23/11/2021

Before :

CHRISTOPHER HANCOCK QC
SITTING AS A JUDGE OF THE HIGH COURT:

Between :

NAVIG8 CHEMICALS POOL INC	<u>Claimant</u>
- and -	
AETURNUM ENERGY INTERNATIONAL PTE LTD	<u>Defendant</u>

Henry Ellis (instructed by HFW) for the Claimant
The Defendant did not appear and was not represented

Hearing dates: 9 November 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 23 November 2021 at 10:30 am.

Christopher Hancock QC :

Introduction and facts.

1. This is the trial of the Claimant’s claims arising under a letter of indemnity (“LOI”) given by the Defendant voyage charterer to the Claimant disponent owner in respect of the discharge of a cargo of light naptha in Singapore without production of the bills of lading in February 2020. The Claimant claims declaratory relief and a final mandatory injunction / order for specific performance in respect of the Defendant’s obligations under the LOI. The Claimant further claims an indemnity in respect of the losses it incurs as a result of complying with the Defendant’s instructions as well as damages for breach of the LOI. The history of the matter is set out in the paragraphs which follow.
2. The Claimant was at all material times the time charterer of the chemical/product tanker “NAVIG8 AMETRINE” under a time charter annexed to a Pool Agreement dated 5 February 2018 between Navig8 Chemical Tankers 4 Inc. (“Owners”) and the Claimant (the “Time Charter”). The Time Charter, also dated 5 February 2018, was on the SHELLTIME 4 form together with rider clauses. Clause 87A of the Time Charter entitled the Claimant to request Owners to discharge cargo without production of the original bills of lading by invoking Owners’ P&I Club Letter of Indemnity (‘LOI’) wording.
3. The Defendant is, and was at all material times, an energy trading firm based in Singapore. I was informed, and am satisfied that, based on publicly available information, including their most recently filed financial statements, they remain active and trading.
4. Pursuant to a voyage charterparty contained in and/or evidenced by a fixture recap dated 20 January 2020 (the “Recap”), the Claimant sub-chartered the Vessel to the Defendant for a single voyage carrying light naptha from 1 safe port Map Ta Phut Thailand to 1-3 safe ports / STS Singapore-Tanjung Langsat-Tanjung Bin Pengerang range (the “Charterparty”). As set out in the Recap, the Charterparty incorporated a logically amended BPVOY4 form and (with amendments) Aeturnum Energy Pte Ltd Additional Clauses and Amendments dated 20 January 2020 (the “Additional Terms”).
5. The Recap provided (insofar as is relevant):

“PART 2: AMENDMENTS TO BPV4

...

SECTION M (REVISED 6 NOVEMBER 2006)

...

*CLAUSE 30.3 BILLS OF LADING AND INDEMNITIES
(REVISED 6TH NOVEMBER 2006)*

*DELETE 2ND LAST LINE “AGREED AND PUBLISHED...”
TILL THE END AND INSERT “OF OWNERS P+I CLUB
WORDINGS”*

6. By reason of the amendments effected by the Recap, clause 30.3 of the Charterparty provided as follows (amendment shown):

“If an original Bill of Lading is not available at any discharge port to which the Vessel may be ordered by Charterers under this Charter, or if Charterers require Owners to deliver cargo to a party or at a port other than as set out in the Bill of Lading, then Owners shall nevertheless discharge such cargo in compliance with Charterers instructions, upon presentation by the consignee nominated by Charterers (the Receiver) of reasonable identification to the Master and in consideration of Charterers indemnifying Owners in the manner prescribed in the form of letter of indemnity of Owners’ P&I Club wordings agreed and published from time to time by the International Group of P&I Clubs addressing the relevant circumstances. ~~Such indemnity shall be deemed to have been given when Charterers issue instructions to Owners pursuant to this Clause.~~”

7. The Claimant’s P&I Club is the North of England P&I (“NEPIA”). NEPIA’s Standard Form Letter of Indemnity for Delivery of Cargo Without Production of the Original Bill of Lading (the “LOI”) provided, insofar as is relevant, as follows:

“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 delivering the cargo in accordance with our request.*
- 2. In the event of proceedings being commenced against you or any of your servants or agents in connection with the 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.*
- 4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery*

to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

5. *As soon as all original bills of lading for the above cargo shall have come into our possession to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.*
6. *This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.”*
8. Pursuant to the Charterparty, and as per the relevant bill of lading (Order No. 269416A) (the “B/L”), a cargo of 13,749.681 mt (131,922 barrels) of light naphtha (the “Cargo”) was shipped on board the Vessel at Map Ta Phut, Thailand on 3 February 2020 for carriage to Singapore. The Cargo was shipped by PTT Public Company Limited and the B/L was issued “*TO THE ORDER OF SUMITOMO MITSUI BANKING CORPORATION, SINGAPORE*” (who were also named on the Cargo Manifest).
9. On 6 February 2020, Mr Luke Soh of the Defendant (who was the individual identified in the Recap as being in charge of “Operations”) sent an email to the Claimant entitled “*LOI INVOKATION*”, identifying the Cargo and the relevant B/L and invoking clause 30.3 of the Charterparty in the following terms:

*“WE, AETURNUM ENERGY INTERNATIONAL PTE LTD,
THE CHARTERER HEREBY INVOKE BPVOY 4 CLAUSE 30.3
AS PER GOVERNING CP*

*AND REQUEST MASTER TO DELIVER THE SAID CARGOES
WITHOUT PRESENTATION OF ORIGINAL BILL OF LADING
TO :*

...

AT UNIVERSAL TERMINAL, SINGAPORE

TERMINAL : UNIVERSAL TERMINAL, SINGAPORE

RECEIVER : HIN LEONG TRADING PTE LTD

CARGO : LIGHT NAPHTHA

*QUANTITY : 13,749.681 MT (AIR) / 131,922 US BARREL AT
60 DEG F*

SHIPTANKS : 1W, 3W, 5W & 7W”

10. The same day, the Claimant emailed the Owners and the Master, invoking “*the Owners P and I Wordings to discharge the cargo without presentation of the OBL’s at Singapore as Per Clause 87 of the ruling TCP*” and directed the Master to discharge to the named receiver as per the Defendant’s email (which was attached). On 7 February

2020, the Master confirmed that he had “...checked all details as per LOI. Will discharge cargo accordingly.”

11. In accordance with the Defendant’s instructions the Vessel berthed at berth 3 of the Universal Terminal, Singapore on 10 February 2020. The Vessel commenced discharge of the Cargo at 15:48hrs LT the same day and completed discharge at 05:18hrs LT on 11 February 2020.
12. On 18 June 2020, Shook Lin & Bok LLP (“Shook Lin”), Singaporean solicitors acting on behalf of ING Bank N.V. (“ING”), wrote to Owners, alleging that the Bank was the lawful holder of the B/L and/or the person entitled to possession of the Cargo, and requesting delivery of the Cargo.
13. The Claimant passed a copy of the Shook Lin letter to the Defendant on 22 June 2020. The Defendant responded to the letter, expressing its surprise on the basis that “[a]s far as we know, the cargo was fully delivered to their customer, Hin Leong, and was in fact discharged in Hin Leong’s terminal”. The Defendant nevertheless stated that “[i]n any event, we certainly intend to cooperate with you on this matter”.
14. On 14 July 2020, the Defendant provided a more detailed account of its understanding of the relevant events in an email to the Claimant as follows:
 - (1) The Cargo was purchased by the Defendant and sold to Hin Leong, whose financing bank was ING.
 - (2) The Cargo was successfully delivered to Hin Leong and discharged into their tanks at the Universal Terminal.
 - (3) No issue arose until several months later, when Hin Leong got into financial difficulty and defaulted on their banks.
 - (4) At the time of Hin Leong’s default the Cargo was stored in the tanks at Universal Terminal and held against Universal Terminal tank receipts.
 - (5) Hin Leong was subsequently alleged to have committed fraud in its transactions, which included disposing of / selling goods held in tanks without the knowledge / approval of their banks.
 - (6) The Defendant believed that this was such a case where ING was financing the Cargo in the tanks for Hin Leong against Universal Terminal tank receipts, but Hin Leong had already sold the Cargo without ING’s knowledge.
 - (7) Simultaneously, the original B/L was passed down the chain through the usual banking channels and reached ING’s counters.
 - (8) The Defendant understood that ING was aware that the Cargo had already been delivered by the Vessel into the Universal Terminal tanks even though the original B/L had not been presented at the time of delivery / discharge.
15. Over the next few months there were exchanges between ING and Owners and/or Gard and Nordisk Legal Services (representing Owners) regarding the misdelivery claim, but neither the Claimant nor Defendant was directly involved.

16. On 19 November 2020, ING commenced *in rem* proceedings against the “*Demise Charterer of the vessel “NAVIG8 AMETRINE (IMO No. 9714513)”* by way of Case No. HC/ADM 308/2020 (the “Arrest Proceedings”). The application was supported by an affidavit of Toh Hwee Choon dated 19 November 2020 (the “Arrest Affidavit”) and an accompanying exhibit. The Singaporean Court granted a Warrant of Arrest over the Vessel the same day.
17. Owners wrote formally to the Claimant in respect of the Arrest on 23 November 2020 and requested that they invoke the LOI given by the voyage charterer.
18. On 24 November 2020, the Owners wrote again to the Claimant providing more details of the claim leading to the arrest, attaching a breakdown of the security sum sought by ING (in the total sum of USD 10,400,000); a copy of the commercial sales invoice in respect of the Cargo; and a copy of the Writ of Summons and Arrest Warrant. Owners requested “*as a first step*” that the Claimant “*now call on the indemnity invoked under the sub charter and have AET put up USD 10.4 million as security to release the vessel...*”
19. The same day, the Claimant requested that the Defendant confirm (amongst other things) that it would, if required, issue security directly to ING to release the Vessel from arrest, alternatively provide countersecurity to Owners in the event that they issued security directly to ING.
20. On 25 November 2020, the Claimant sent the Defendant a copy of Owners’ message of 24 November 2020 and called upon the Defendant to provide security.
21. On 26 November 2020, the Defendant responded protesting ING’s approach, and contending that ING’s misdelivery claim was “*disingenuous*”, but at the same time assured the Claimant that “*...we will engage our banks today on the provision of the bank guarantee to secure the release of the vessel, and we will update you as soon as I [sic] hear from them. To this end, we will also reach out to ING to iron out the details of the security demanded by them*”. Later that day the Defendant asked for ING’s contact details to enable them to discuss the wording and requirements of the security demanded.
22. On 27 November 2020, Shem Khoo of Focus Law Asia LLC, Singapore solicitors for the Defendant, corresponded with Nathanael Lin of Rajah & Tann, the new Singapore solicitors appointed by ING, directly, regarding the provision of security. Mr Khoo confirmed that the Defendant was “*in principle, agreeable to furnish security for the release of the vessel...*”.
23. Later that evening, Rajah & Tann responded with ING’s requirements for the security, which were “*a bank guarantee for the total sum of US\$10.4 million, issued on the application of [AEI] by a Singapore bank or the Singapore branch of a first-class international bank acceptable to [ING]*” and provided ING’s bank guarantee wording.
24. Following further chasers by the Claimant, on 29 November 2020, the Defendant indicated that it had received ING’s security requirements and bank guarantee wording the previous evening and stated (amongst other things) that “*we will work with our banks to obtain security.*”

25. On 30 November 2020, the Defendant informed the Claimant that it had written to all four of the banks that it had accounts with regarding ING's security request: three of them had refused to assist with the required bank guarantee, and they were still to hear from the fourth (Citibank).
26. The Claimant responded the same day, proposing two alternative security options to a bank guarantee: (i) arranging an LOU via companies like Aspen or International Sureties; or (ii) paying cash into the Singapore Court.
27. On 1 December 2020, the Claimant wrote to the Defendant requesting an update by 12pm London time. The Defendant responded informing the Claimant that Citibank had declined to assist, but that they had reached out to both International Sureties and Aspen to see whether they could assist. The Defendant also made clear that its management were in "*urgent discussions...to put up a proposal for alternative security for [the Claimant's] consideration, in case International Sureties and Aspen cannot assist.*" The Defendant also made a "without prejudice" proposal of alternative security the same day but it was not acceptable to the Claimant as it was not security in the form of cash or a bank guarantee, let alone in the form requested by ING.
28. The same day, HFW, solicitors for the Claimant, wrote to the Defendant formally demanding that the Defendant put up the security demanded by ING and take all steps necessary to release the Vessel by 10:00am on 4 December 2020, failing which HFW had instructions to seek a mandatory injunction from the English High Court.
29. On 3 December 2020, HFW wrote to the Defendant again, pointing out that the Defendant's audited financial statement for 31 December 2019 showed cash/cash equivalent holdings of USD 43,129,526, and suggesting this could be used to secure ING. No open response was received.
30. There followed some without prejudice correspondence between the parties during which the Defendant indicated that it was faced with a large number of potential claims, which had served to curtail its credit lines with its banks, rendering it unable to secure a bank guarantee due to a lack of liquidity (despite the Defendant's best efforts to do so), with the consequence that the Defendant was unable to provide security (save for that offered by way of its "without prejudice" offer).
31. The Defendant accordingly failed to provide security to procure the release of the Vessel within 10:00am on 4 December 2020 or at all.
32. On 6 December 2020, HFW wrote to the Defendant on an open basis, requesting the Defendant respond to three queries by 11:00 London time on 7 December 2021. HFW asked the Defendant (i) to confirm both its current level of cash / cash equivalent and as per its 30 September 2020 unaudited accounts; (ii) to provide a copy of the 30 September 2020 unaudited accounts on an open basis and (iii) to confirm that if it had available cash it would pay funds into the Singaporean Court as security for ING's claim.
33. As no response was received to HFW's 6 December email, the Claimant applied for a mandatory interim injunction on 8 December 2020. The matter came before Bryan J on 9 December 2020, the Defendant having been given informal notice by email on 8 December 2020. The Defendant did not attend the hearing, but immediately prior to it,

the Defendant's London solicitors, Winter Scott LLP, sent an email to the Court stating, amongst other things: "*We are instructed that the defendant is cashflow insolvent*". This email was the subject of submissions before Bryan J at the hearing.

34. Bryan J determined (on an interlocutory basis) that the LOI had been invoked, its terms engaged and that it was otherwise appropriate to grant a mandatory injunction, which he did by his Order dated 9 December 2020. Having seen a note of the hearing taken by HFW, I understand that the Judge ruled that it was for the Defendant to demonstrate it was impossible for it to provide security and it had not done so on the evidence before the Court, meaning that it could not tip the balance of convenience against the granting of the injunction sought by the Claimant.
35. On 11 December 2020, ING served its Particulars of Claim in the Arrest proceedings, alleging misdelivery of the Cargo and claiming USD 8,561,342.03.
36. On 14 December 2020, the Defendant applied to set aside the Order of Bryan J on the basis that "*it is impossible for the Defendant to comply with the Injunction and Order*". The Claimant cross-applied on 15 December 2020 for the continuation of the injunction. In support of its application, the Defendant served two witness statements from its business director Mr Lee Yew Wei which sought to substantiate the allegation made at the without notice hearing that it was impossible for the Defendant to comply with its obligations under the LOI because it was "*cashflow insolvent*".
37. The return date came before Sonia Tolaney QC sitting as a judge of the High Court. The hearing was fully contested with the Defendant represented by Winter Scott and Leading Counsel (Michael Collett QC).
38. In its application to set aside, it would appear from its Skeleton Argument that the Defendant did not dispute that there is a deemed LOI between itself and the Claimant on the terms of NEPIA's Standard Form Letter of Indemnity for Delivery of Cargo Without Production of the Original Bill of Lading that is engaged on the facts of this case. Instead, the Defendant focussed its fire on the relief itself, and sought to overturn the interim injunction on grounds that (i) damages would be an adequate remedy for the Claimant and (ii) the balance of convenience favoured discharging the injunction.
39. In a reasoned judgment, the Deputy Judge continued the interim injunction by an Order dated 18 December 2020.
40. The Deputy Judge first determined that damages were not an adequate remedy for the Claimant, stating at [26]:

"...the whole purpose of the provisions requiring security is so that a party does not have to seek damages but rather its position is protected by the provision of security. As a matter of logic therefore, the right to damages does not adequately compensate for the failure to provide security (see the judgment of Cooke J in the Laemthong Glory (No. 2) [2005] 1 Lloyd's Rep. 632 at [51]."
41. She went on to hold that, despite Mr Wei's evidence, the Defendant had not discharged its "*high burden*" of proving the alleged impossibility to the required standard.

42. Following the continuation of the mandatory interim injunction, the proceedings initially progressed in the usual way for a Part 7 claim in the Commercial Court. The parties exchanged pleadings. The Defendant's Defence consisted largely of non-admissions. The Defendant put the Claimant to proof that the terms of the LOI were engaged and of its entitlement to an indemnity and/or damages. The Defendant did however put forward a positive defence to the claim for a final mandatory injunction and / or specific performance; namely that it was impossible for the Defendant to comply with the LOI due to its financial position.
43. After the close of pleadings, a Case Management Conference (CMC) was listed. The parties prepared and filed the usual Case Management documents and a hearing took place in front of Butcher J on 30 April 2021 at which both parties were represented by the same counsel as on the return date on 18 December 2020, namely Ms Caroline Pounds and Mr Michael Collett QC.
44. At the CMC the only issue of substance between the parties was the extent of the disclosure required in relation to the impossibility issue. By the CMC Order dated 7 May 2021, the Court ordered Extended Disclosure by 15 June 2021, with production of documents seven days thereafter, in the form of Model C for Disclosure Issue 3; namely "*Whether it is impossible for the Defendant to comply with its obligations pursuant to the LOP*". The Claimant was also granted permission to serve expert forensic accountancy evidence as to the Defendant's financial position.
45. Following the CMC, the matter was listed for a three-day trial commencing on 8 November 2021, a date agreed to accommodate both parties and their legal teams.
46. On 15 June 2021, the Claimant served its Extended Disclosure List on Winter Scott. No list of documents was served by the Defendant. Winter Scott emailed the Claimant's solicitors HFW that day stating that they had not been provided with a disclosure list by the Defendant and that, absent instructions to take matters forward, they would have to apply to the Court to come off the record. The same day, Winter Scott applied to cease acting for the Defendant.
47. On 24 June 2021, Moulder J granted Winter Scott's application to cease acting for the Defendant. The Defendant has played no active part in these proceedings since that date, although I am satisfied that documents have been served both by hand and email.
48. In light of the Defendant's non-compliance with its disclosure obligations under the CMC Order, on 28 July 2021 the Claimant applied for an unless order in terms that unless the Defendant complied with its disclosure obligations under the CMC Order within 14 days, it would be debarred from maintaining its impossibility defence and debarred from relying on any disclosure or documents or any factual or expert evidence in support thereof. The Unless Order was granted by Jacobs J on 4 August 2021.
49. The Defendant failed to comply with the Unless Order within 14 days or at all. Accordingly, the Claimant applied to the Court by letter on 15 September 2021 for: (i) the trial listing to be reduced to 1 day, and (ii) permission to amend its Particulars of Claim to particularise its claim for an indemnity and/or damages in respect of loss of use of the vessel and to file supporting evidence.
50. On 1 October 2021 Foxton J granted the Claimant's application and ordered that:

- (1) The estimated length of the trial be reduced from 2-3 days to 1 day, plus half a day of pre-reading.
 - (2) The Defendant was debarred from maintaining its defence of impossibility.
 - (3) The Claimant was permitted to amend its Particulars of Claim to add a claim for damages for loss of use of the vessel during the period of the arrest and file supporting evidence.
51. The Arrest Proceedings in Singapore have been running in parallel with these proceedings, albeit they are not as far advanced. ING have applied for summary judgement, the parties have exchanged evidence, and I was told on the day of the hearing of this trial that a the summary judgment application is scheduled for a hearing on 8 December 2021.
52. As the Defendant did not comply with the interim mandatory injunction, on 21 December 2020 the Claimant took steps to provide the necessary security to Owners so that they could procure the release of the Vessel from Arrest.
53. To do so, the Claimant paid USD 9,500,000 to Owners' P&I Club's (Gard) designated account with Nordea Bank and issued a pledge in favour of Gard (the "Pledge Agreement").
54. On receipt of the signed Pledge Agreement and the USD 9,500,000, Lingard Limited as managers for Gard issued a Letter of Undertaking in the sum of USD 9,500,000 in favour of ING (the "LOU") to secure the release of the Vessel.
55. The Vessel was duly released from the Arrest on 22 December 2020.
56. Since the Defendant did not appear at the trial, then it was incumbent on the Claimant to set out the arguments that the Defendant might have raised. I am satisfied that this has been done.

The Issues

57. As a result of the Defendant's recent non-participation in the proceedings, the Court is now faced with a slimmed down menu of issues from that agreed prior to the CMC. By reference to that agreed list, it appeared that the following issues remained for determination by the Court at this trial.

Liability

- (1) Was delivery of the Cargo effected in accordance with the Defendant's instructions and the terms of the LOI?
- (2) Was (and is) the Defendant obliged under the LOI to indemnify the Claimant in respect of any liability, loss, damage or expense of whatsoever nature which the Claimant might incur by reason of delivering the Cargo without production of the original Bills of Lading in accordance with the Defendant's request?
- (3) Was (and is) the Defendant obliged under the LOI to provide the Claimant (or its servants or agents) upon demand with sufficient funds to defend any proceedings

commenced against the Claimant (or its servants or agents) in connection with the delivery of the Cargo?

- (4) Was (and is) the Defendant obliged under the LOI to provide security or substitute security for the release of the Vessel and to indemnify the Claimant in respect of any liability, loss, damage or expense caused by the Arrest (whether or not the Arrest was justified)?
- (5) Has the Defendant breached the LOI?

Relief / Loss and damage

- (6) Is the Claimant entitled to declaratory relief and a final mandatory injunction / order for specific performance in respect of the Defendant's obligations pursuant to the LOI?
- (7) What is the quantum of the Claimant's recoverable loss and damage under the LOI arising from the delivery of the Cargo?

The evidence before me.

58. I was provided with four witness statements; three from Michael Ritter, a partner of HFW; and one from Jak Middleton, a commercial analyst employed by the Claimant. I heard from Mr Middleton, but did not need to hear from Mr Ritter, beyond reading his statements. Mr Ritter's first two statements were served in support of the Claimant's applications for interim injunctive relief and the unless order. His third statement was served shortly before trial to update the Court as to the status of the Defendant and the progress of the misdelivery claim in Singapore following enquiries made the week before the trial.
59. Mr Middleton's statement explains the basis for the Claimant's TCE calculation included within its disclosure, in support of the Claimant's claim for loss of use of the Vessel during the period of the arrest. As I have indicated, Mr Middleton gave oral evidence before me.

ISSUE 1: LIABILITY UNDER THE LOI

Was delivery of the Cargo effected in accordance with the Defendant's instructions and the terms of the LOI?

60. It is common ground in the agreed list of issues, agreed before the CMC, that the Defendant requested that the Claimant deliver the Cargo to Hin Leong at Universal Terminal Singapore. It is also common ground that the Claimant discharged the Cargo at Universal Terminal Singapore.
61. Nevertheless, the Defendant has put the Claimant to proof that a contract on the terms of the LOI came into existence as a consequence, contending that no such contract could come into existence under clause 30.3 of the Charterparty unless the consignee presented reasonable identification to the Master. The Claimant contended that this is a bad point for several reasons, as follows:

- (1) There is nothing in clause 30.3 that makes the presentation of reasonable identification by the consignee a condition precedent to the existence of a contract on the terms of the LOI. That is not what the clause says. Clause 30.3 provides that the Claimant must discharge the cargo in accordance with the Defendant's instructions and in consideration for so doing, the Defendant will indemnify the Claimant pursuant to the LOI.
- (2) The requirement for reasonable identification is, properly construed, included in clause 30.3 for the benefit and protection of the Master and the Claimant; it entitles the Master to refuse to discharge in accordance with the Defendant's instructions where the consignee is unable to provide reasonable identification, notwithstanding the promise to indemnify. In this way it protects the Master/Claimant from any later argument by the Defendant that the indemnity is not engaged because they delivered the cargo to the wrong person. It is not a mandatory technical precondition to the existence of the indemnity contract, and the Defendant's retrospective attempt to make it so is unmeritorious and incorrect.
- (3) This accords with the wording of the LOI itself:
 - (a) The preamble to the LOI does not require that the consignee present reasonable identification to the Master. On the contrary, it envisages delivery of the cargo being made to the party identified by the Defendant, or "*to such party as you [i.e. the Claimant] believe to be or to represent [the same party] or to be acting on behalf of [the same party]*": i.e. the Claimant's/Master's reasonable belief suffices (and it is not alleged here that the Master did not reasonably believe that he delivered the Cargo to Hin Leong).
 - (b) Paragraph 4 of the LOI expressly provided that if the place where the Defendant requested the Claimant to make delivery was a bulk liquid or gas terminal facility then delivery to the said terminal is deemed to be delivery to the party nominated by the Defendant. This is incompatible with there being a "reasonable identification" condition precedent, as alleged.
 - (c) It follows from the foregoing that delivery at the Universal Terminal, being a bulk liquid (petroleum) storage terminal, was delivery to the party nominated by the Defendant for the purposes of the LOI; namely Hin Leong.
- (4) In any event, the available evidence suggests clearly that the Cargo was delivered to Hin Leong in accordance with the Defendant's instructions:
 - (a) The Vessel's discharge at Universal Terminal was attended by the Defendant's nominated discharge port agent, BH Shipping Agencies Pte Ltd ("BH Shipping"). It is reasonable to assume that had the Cargo not been discharged to the Defendant's nominated party, their own attending agent would have noticed and complained.
 - (b) The Defendant's own evidence in both July and November 2020 was that the Cargo had been successfully delivered to Hin Leong and discharged into their tanks at the Universal Terminal where it was subsequently stored. The

Defendant has never subsequently sought to correct that contention and indeed refers to it as grounds on which the ING claim could be resisted.

- (c) The Cargo was discharged in February 2020. It has never positively been contended by anyone since that date that it was not discharged to Hin Leong as the Defendant instructed. It can therefore reasonably be inferred that it was.
 - (5) If the Court is satisfied that the Cargo was discharged to Hin Leong, then that is the end of this point: the Cargo was discharged in accordance with the Defendant's instructions, and it follows that the LOI is engaged on the facts of this case.
62. In my judgment, delivery was effected in accordance with the Defendant's request to Hin Leong, and the LOI was therefore engaged. I accept the submission that the obligation on the part of the master was to deliver to the party who he reasonably believed to be the party identified by the Defendant – here Hin Leong. In my view it is clear from the evidence adduced by the Defendant that delivery was indeed effected to Hin Leong. In addition, I accept the submission that delivery to the bulk tanks was good delivery by reason of the fourth paragraph of the LOI. I reject the argument that the production of identification is a condition precedent to the triggering of the Defendant's obligations. Instead, I hold that those obligations are triggered by the delivery of the cargo to the party identified by the Defendant when such delivery is made, at the Defendant's request, without production of the bill of lading.

What are the Defendant's obligations under the LOI?

63. Although the Defendant has formally put the Claimant to proof as to scope of its obligations under the LOI, the Claimant pointed out that it has not advanced any positive case on this issue. The Claimant's case was that the Defendant's obligations are self-explanatory and set out in the LOI. In summary:
- (1) Pursuant to paragraph 1 of the LOI, the Defendant agreed to indemnify the Claimant in respect of any liability, loss, damage or expense of whatsoever nature which the Claimant might incur by reason of delivering the Cargo in accordance with the Defendant's request.
 - (2) Pursuant to paragraph 2 of the LOI, in the event of any proceedings being commenced against the Claimant or any of its servants or agents, the Defendant agreed to provide the Claimant, or its servants or agents, with sufficient funds to defend the same on their demand. The Claimant's case is that Owners were acting as the Claimant's servants or agents when they delivered the Cargo to Hin Leong in accordance with the Defendant's instructions: see Henshaw J in Trafigura Maritime Logistics v Clearlake Shipping [2021] 1 Lloyd's Rep. 533 at [32]. Consequently, the Defendant is obliged to provide the Claimant and/or Owners with sufficient funds to defend the Singaporean proceedings.
 - (3) Pursuant to paragraph 3 of the LOI, the Defendant is obliged to provide security to secure the release of the Vessel from arrest and to indemnify the Claimant in respect of any liability, loss, damage or expense caused by the Arrest, whether or not such arrest is justified.

- (4) Where, as here, the Vessel has been released following the provision of security by Owners, the Defendant remains under an obligation to put up substitute security in accordance with paragraph 3 of the LOI: The Bremen Max [2009] 2 Lloyd's Rep. p. 81 at [23].

64. I can deal with this issue briefly. I accept the Claimant's submissions as set out above as to the scope of the Defendant's obligations under the LOI.

Has the Defendant breached the LOI?

65. The Claimant asserts that the Defendant has failed to comply with any of its obligations under the LOI.

- (1) It has not indemnified the Claimant in respect of its loss and damage incurred by reason of delivering the Cargo in accordance with its instructions.
- (2) It has not provided the Claimant or Owners with any funds to defend the Arrest Proceedings.
- (3) It has not provided substitute security to take the place of the security put up by the Claimant and Owners to procure the release of the Vessel.
- (4) In the circumstances, the irresistible conclusion is that the Defendant has breached the LOI.

66. Again, I can deal with this issue briefly. On the evidence put before me, it is clear that the factual allegations set out in subparagraphs 66(1) to (3) have been made out. Accordingly, it is clear that the Defendant has acted in breach of its obligations under the LOI.

ISSUE 2: RELIEF SOUGHT AND LOSS AND DAMAGE

Order for specific performance

67. The Claimant seeks a final mandatory injunction / order for specific performance of the Claimant's obligation under paragraph 3 of the LOI. These remedies are, in the present case, one and the same.

68. It is settled law that the obligations imposed on the indemnifier under a maritime contract of indemnity are amenable to enforcement by a mandatory injunction / order for specific performance: see Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd [2020] EWHC 726 (Comm) (Henshaw J) at [31], Harmony Innovation Shipping Ltd v Caravel Shipping Inc [2019] EWHC 1037 (Comm) (Sir Ross Cranston) at [30], The Bremen Max [2009] 1 Lloyd's Rep. 81 (Teare J) at [21] and The Laemthong Glory (No. 2) [2005] 1 Lloyd's Rep. 632 (Cooke J) at [51]-[52]. Damages are not an adequate remedy in this context.

69. The Claimant submitted as follows in this regard:

- (1) That damages were not an adequate remedy was accepted by both Bryan J at the without notice hearing and Deputy Judge Tolaney Q.C. at the return date.

- (2) In its Defence, the Defendant denied the Claimant's entitlement to this remedy on grounds that (i) the power to grant such relief is discretionary and (ii) it would be impossible for the Defendant to comply with such an order. It has since been debarred from advancing that impossibility defence.
 - (3) It is accepted that the power to grant such relief is discretionary, but it is submitted that this is a paradigm case for such an order.
 - (4) The Claimant is *prima facie* entitled to an order for an injunction / specific performance, which it was granted on an interim basis. Nothing substantive has changed since that interim relief was granted.
 - (5) To the extent that any concerns of hardship on the part of the Defendant might now legitimately be raised, they are of much reduced weight as the Defendant must now be regarded as a wrongdoer who is in breach of the LOI. In any event, no such concerns have ever been raised.
 - (6) No defence of impossibility can now be raised.
 - (7) Despite the fact that the Defendant has chosen to disengage from these proceedings and has not obeyed the interim mandatory injunction, it should not be inferred that a final injunction / order for specific performance would not be obeyed or that equity would be acting in vain by granting the relief sought. The Defendant remains a "live" or "active" company in Singapore. It is not insolvent or in judicial management. While its financial status is not presently strong, as recently as July 2021 it settled a substantial claim for c. USD 7,600,000. It therefore remains possible that the Defendant may yet comply with the Court's order. In particular, the prospects of contempt proceedings against the Defendant and/or its directors may prompt such compliance. Conversely, if the injunction is not granted, the Defendant's strategy of non-compliance and non-participation to date will have been rewarded by the Court.
 - (8) There can be no suggestion that the Defendant has delayed in asserting its rights under the LOI or comes to Court without clean hands.
 - (9) It follows that the Court should exercise its discretion to grant the equitable relief that the Claimant seeks.
70. I accept the Claimant's submissions in this regard. As noted, the Claimant obtained orders for mandatory relief from Bryan J and Sonia Toloney QC, sitting as a judge of the High Court. I agree with both of those judges that this is an appropriate case for the grant of specific performance, essentially for the reasons given by the Claimant which I have set out above, and I so order.

Loss and Damage arising from the detention of the Vessel

71. Next, the Claimant also claims damages for breach of the LOI. At present, the Claimant's claim for damages is limited to its loss and damage already suffered by reason of the loss of use of the Vessel during the period of her arrest, although, as I note below in relation to the claim for declaratory relief, it reserves the right to claim further damages once the claim in Singapore has been determined.

72. The Claimant claims USD 390,838 for loss of use of the Vessel during the 32.63 days that she was under arrest. The quantum of this claim has been calculated by using a time charter equivalent (“TCE”) of USD 11,979 per day, based on what she was earning on her then current employment with BP and Trafigura. Absent any index of market rates for the Vessel, or expert broker evidence, this is the best evidence of the Vessel’s earning potential at the relevant time.
73. A full explanation of the basis of this TCE is set out in the witness statement of Jak Middleton, a commercial analyst at the Claimant, which cross refers to the TCE breakdown and relevant supporting documentation for the figures contained within it.
74. I have reviewed the summary documents with the assistance of Mr Middleton. In addition, I have reviewed the supporting documents provided by the Claimant. I am satisfied that this claim has been adequately evidenced, and that it is clearly correct in principle. Accordingly, I order that the Defendant pay damages to the Claimant in the sum of US\$390,838.

Declaratory relief

75. The Claimant seeks two forms of declaratory relief:
- (1) A declaration that the Defendant is obliged to indemnify the Claimant, its servants and agents in respect of any liability, loss, damage or expense of whatsoever nature sustained by reason of the delivery of the Cargo without production of the original Bills of Lading in accordance with the Defendant’s request.
 - (2) A declaration that, upon a demand to do so from Owners or the Claimant, the Defendant is obliged to supply directly to Owners or the Claimant sufficient funds to defend the Arrest Proceedings and/or any proceedings brought by Owners and/or ING against the Claimant arising out of or in connection with the delivery of the Cargo.
76. I indicated at the hearing that I was minded to adjourn this claim until after the hearing of the summary judgment application in Singapore, which will make matters much clearer. The Claimant did not resist this approach. Accordingly, I order that the claim for declaratory relief (and indemnity) be adjourned until a date in early January next year.