Neutral Citation Number: [2020] EWHC 1073 (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: 06/05/2020

Before :

MR. JUSTICE TEARE

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Between :

TRAFIGURA MARITIME LOGISTICS PTE LTD	**Claimant**
- and -	
CLEARLAKE SHIPPING PTE LTD	**Defendant**

And Between :

(1) CLEARLAKE CHARTERING USA INC.	**Claimants**
(2) CLEARLAKE SHIPPING PTE LTD	
- 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: 30 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 Wednesday 06 May 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 :

1. On 27 April 2020 I gave judgment in respect of applications made in two related actions on the return date of orders for interim mandatory relief; see [2020] EWHC 995 (Comm). The mandatory relief granted by the court was to enforce an obligation to provide the security required to secure the release of a vessel from arrest in Singapore. On 30 April 2020 I heard counsel in respect of the precise form of the order required to give effect to my judgment and in respect of costs.

2. The parties and the nature of the dispute between them are apparent from my earlier judgment. I shall assume that the reader of this judgment is familiar with my earlier judgment.

The form of the order

3. Counsel for Trafigura identified no less than 8 points which the parties had not been able to agree and therefore had to be resolved.

More general words

4. The first concerns the question whether the order should not only set out the specific order which I had resolved to make, that is, to order the charterer, Clearlake, and the sub-charterer, Petrobras, to make a payment into court in Singapore within 8 working days of the date on which I formally handed down judgment, but should also repeat the more general order made by the court at the ex parte hearing, that is, that the charterer and sub-charterer must provide forthwith such bail or other security as may be required to secure the release of the Vessel. Counsel for Trafigura requested that the more general wording be included. Counsel for Clearlake and Petrobras opposed the inclusion of such general words.

5. At first sight the opposition of Clearlake and Petrobras appears odd because they were both willing on 22 April 2020 (the date of the inter partes hearing) for the injunctive relief to continue in those terms. However, they say that in circumstances where the court acceded to the application made by Trafigura for an order which gave "greater precision to the order by identifying the date by which action must be taken and describing the action which must be taken" (see paragraph 10 of my earlier judgment) the retention of the more general words risked confusion, something which was undesirable in an order of the court, especially one which contained a penal notice.

6. There seems to be force in this argument. In circumstances where Trafigura wished to identify with precision what Clearlake and Petrobras were obliged to do the retention of more general words tends to muddy the waters which had just been made clear.

7. Counsel for Trafigura identified two reasons for keeping the more general words in the order.

8. The first related to the fact since my earlier judgment Petrobras had informed Clearlake and Trafigura that Natixis was willing to talk to Petrobras about the wording of the bank guarantee which it would accept. This was contrary to Natixis' position on 22 April; see paragraph 49 of my earlier judgment. Counsel for Trafigura therefore suggested that the more general words were required to ensure that

Clearlake (and Petrobras) continued their efforts to agree the terms of a bank guarantee acceptable to Natixis, so that security might be provided before the date by which the payment into court was required.

9. There was no evidence that Natixis was willing to concede either the jurisdiction point or the settlement point (see paragraphs 52 and 53 of my earlier judgment). But assuming that Natixis was so willing the more general words are not, I think, necessary to ensure that Clearlake and Petrobras pursue negotiations with Natixis. First, they have demonstrated genuine and sincere efforts to provide security by way of a guarantee (see paragraph 51 of my earlier judgment). Second, they have every incentive to continue with such efforts because the provision of a bank guarantee would be less costly than a payment into court. Thus it was they that requested a provision in the order to the effect that if a bank guarantee were provided they would not need to make a payment into court.

10. The second reason suggested for retaining the more general words was that Clearlake and Petrobras feared that Natixis might object to the vessel being released following payment into court and if that objection were successful and the Singapore court required something further to be provided by way of security then the more general words were required to ensure that that further security was provided.

11. However, it is very difficult to see on what basis Natixis could object to the release of the vessel in circumstances where the requested sum of US$76 million had been paid into court. This therefore seems to be a most unlikely event. Were it to occur, it would be a surprising development and I think it would be preferable for the question whether Clearlake and Petrobras should be ordered to provide some further security to be brought before the court pursuant to the liberty to apply. This would enable the court to say whether, in those surprising circumstances, Clearlake and Petrobras were obliged to provide further security. That seems preferable to assuming that Clearlake and Petrobras would be so obliged in circumstances which are currently difficult to envisage.

12. I was therefore unpersuaded that the more general words should be retained.

The specific dates

13. In my earlier judgment I concluded that the requested sum be paid into court within 8 working days of the date on which judgment was handed down. I had thought that that would be 7 May. However, I had not taken into account that 1 May was a public holiday in Brazil and in Singapore and that 7 May was a public holiday in Singapore. Counsel for Trafigura accepted that in the case of Clearlake, a Singaporean company, 8 working days expired on Monday 11 May. Counsel further submitted that in the case of Petrobras, a Brazilian company, 8 working days expired on Friday 8 May. Counsel for Petrobras said that since Petrobras had to effect payment in Singapore it was relevant to take into account that 7 May was a public holiday in Singapore because on that day the Singapore banking and judicial systems would not be functioning. Thus 8 working days expired on 11 May.

14. It seems to me that when assessing working days it is necessary to take into account public holidays in Singapore, both in the case of Clearlake and in the case of Petrobras, because the payment in to court has to be effected in Singapore. To ignore

Singaporean public holidays would give an unrealistic assessment of the available working days.

15. I therefore concluded that in the case of both Clearlake and Petrobras 8 working days expires on 11 May.

The proviso concerning a bank guarantee

16. There is no dispute that this proviso be included in the order. The dispute concerns whether it be in the form suggested by Trafigura or in the form suggested by Petrobras. I consider that it should be in the form suggested by Trafigura. That relates to the provision of a bank guarantee, whereas Petrobras' suggestion relates only to agreeing the terms of a bank guarantee, not necessarily its provision.

Staggered obligations

17. Counsel for Clearlake submitted that, although Clearlake owed an obligation to Trafigura to provide security, the date on which it should provide security should be later than the date on which Petrobras was to provide security so that there would be no unnecessary duplication of expense. If they both had to make payment by 11 May, there would be duplication of expense. If however, Clearlake only had to do so by 15 May then, in the event, as expected, that Petrobras made payment in by 11 May, there would be no need for Clearlake to incur the expenditure of making a payment in.

18. Counsel for Trafigura objected to this. He pointed out that Clearlake owed an obligation to Trafigura and that this court had held that such obligation should be satisfied by payment in by 11 May. Clearlake was not entitled to wait and see whether it was necessary for it to make a payment in, especially where the ex parte order had been made as long ago as 24 March.

19. There is much force in that objection. Clearlake has undertaken its own obligation to indemnify Trafigura. Its contractual obligation is not to provide security only if Petrobras does not do so.

20. However, this court has to make an order in both actions. In circumstances where there are back to back obligations the court is entitled, I think, to bear in mind the possible wasted costs involved in acceding to that objection. I think that the court's order should seek to avoid unnecessary expense if that is possible and consistent with Trafigura's contractual rights. Thus, if the position had been, as submitted by Trafigura, that Petrobras' payment in should be made by 8 May, it would have been appropriate and not damaging to Trafigura's contractual rights against Clearlake, to order staggered payments by 8 and 11 May. But that is not the position. Both Clearlake and Petrobras must make payment in by 11 May. To permit a later payment in by Clearlake after 11 May would damage Trafigura's contractual rights against Clearlake.

21. Thus the question is whether it is appropriate to damage Trafigura's contractual rights against Clearlake in order to enable Clearlake to avoid incurring unnecessary costs. Counsel for Clearlake said that it was because any loss to Trafigura caused by the delay in the release of the vessel from arrest resulting from Clearlake having an additional period in which to provide security could (probably) be recovered from

Clearlake pursuant to its indemnity. This point has some cogency because it shows that Trafigura is (probably) not without remedy. But is it appropriate to subject Trafigura to the risk of such loss when, contractually, they should not be exposed to it ?

22. After some hesitation I have concluded that counsel for Trafigura is correct. Clearlake has entered into a charterparty with Trafigura. It has therefore undertaken obligations to Trafigura. Performance of those obligations is not dependent on what a sub-charterer does or does not do. Clearlake is not entitled to say that it will only perform its obligations to Trafigura if Petrobras does not perform its obligations to Clearlake.

23. I appreciate that this means that Clearlake may incur costs which in the event will be unnecessary (because Petrobras has said it will effect payment in). I also appreciate that Trafigura does not expect two payments in to court because it accepts that Clearlake may perform its obligation by "procuring" a payment in to court. Thus if Petrobras makes a payment in Trafigura does not expect Clearlake to make a further payment in. However, to relieve Clearlake of the need to incur costs which are likely to prove unnecessary involves rewriting Clearlake's contractual obligation. That would, in my judgment, be wrong in principle. Furthermore, if a choice has to be made between loss to Trafigura and loss to Clearlake, Trafigura should be protected rather than Clearlake because it is Clearlake which owes the obligation and Trafigura which is entitled to the benefit of it.

24. There will therefore be no staggered payments.

Making Petrobras party to the action between Trafigura and Clearlake for the purposes of costs.

25. This arises in connection with costs and I shall deal with it below under that heading.

Reservation of the right of Trafigura to allege a breach of the injunction

26. It was apparent from the debate before me that so long as there was also a reservation of the right of Clearlake and Petrobras to argue that Trafigura was estopped from alleging breach by reason of my earlier judgment there was no objection to this reservation. I shall therefore ask counsel to agree an appropriate form of words reserving both rights.

Concurrent case management

27. Counsel for Clearlake urged the court to make provision for concurrent case management of the two actions by (a) making an order that all open correspondence between Trafigura and Clearlake be copied to Petrobras and (b) stating that where there is an application in the one action, it be heard at the same time as the equivalent application in the other action.

28. It seems to me that the latter order (b) is sensible. So far as the former order (a) is concerned I am not persuaded that it should be made with regard to all open correspondence. It should however be made with respect to open correspondence concerning equivalent applications in both actions.

Costs

29. I shall first deal with the position between Trafigura and Clearlake.

30. Clearlake accepts (subject to its claim that Petrobras should be made liable for all of Clearlake's liability to Trafigura in costs) that Trafigura is entitled to its costs up until 15 April 2020. Thereafter, whilst Trafigura claims all of its costs, Clearlake says that it should recover no more than 50% of its costs to reflect the issues on which it lost at the inter partes hearing.

31. Although Trafigura obtained a variation to the injunction granted ex parte its primary claim at the inter partes hearing was for an order that Clearlake provide a bank guarantee on the terms acceptable to Natixis. It failed on this both in law (the issue of construction of the indemnity) and on the facts. Moreover, despite being provided with full and detailed evidence as to the steps taken by Clearlake (and Petrobras) to agree the terms of a bank guarantee it continued to accuse Clearlake of "dragging its feet, and otherwise engineering a situation of delay in the hope that it will never need to put up security". I was unable to accept that serious criticism. At the same time it accused Clearlake of a breach of the terms of the injunction whilst not actually seeking a finding to that effect. In those circumstances it was not surprising that Clearlake (and Petrobras) felt it necessary to adduce substantial evidence describing the course of events. Of course a successful claimant is not to be deprived of its costs because it did not win on all points. But Trafigura failed on a major part of its case which had generated considerable costs in terms of evidence. Whilst thinking about costs before reading the skeleton arguments, I had formed the provisional view that a reduction of about 50% would be appropriate, fair and just. I was therefore not surprised to read that this was the submission of counsel for Clearlake and Petrobras. By the same token I was surprised to read the submission of counsel for Trafigura that, if any reduction was appropriate, a modest reduction of 10-15% was appropriate. I have reconsidered the matter in the light of the written and oral submissions of counsel but I remain of the view that there should be a reduction of 50%.

32. Counsel for Trafigura sought its costs on the indemnity basis. It is well-established that to justify such an order the party's conduct of the case must be out of the norm in such a way as makes it appropriate to order costs on the indemnity basis. It was said that all of Trafigura's costs, not just those incurred before 15 April 2020, should be assessed on the indemnity basis. In oral submissions reliance was placed on three matters. First, it was said that Clearlake deliberately did not put up security and that it was guilty of extraordinary behaviour. Reliance was placed on the approach of Colman J. in *National Westminster Bank v Rabobank* [2008] 1 Lloyd's Rep. 16 where a party commenced proceedings in breach of an anti-suit clause and was ordered to pay costs on the indemnity basis. Second, it was said that Clearlake had not kept Trafigura informed of what was going on with regard to the provision of security. Third, it was said to be "relevant to bear in mind" that pursuant to the indemnity in the charterparty Trafigura was entitled to be held harmless in respect of any liability, loss, damage or expense of whatsoever nature which it may sustain by reason of giving delivery of the cargo in accordance with the request of Clearlake.

33. I was not persuaded that any of these matters, whether viewed individually or collectively, justified an order for costs on the indemnity basis. There is, I think, no doubt that Clearlake was obliged to put up security once the vessel was arrested.

Clearlake, having been given short notice of the application for ex parte relief, resisted the grant of ex parte relief. It failed and it has not sought to resurrect any of the arguments it sought to run before Henshaw J. Thereafter, it made sincere and genuine efforts to reach agreement with the arresting party as to the terms of the required bank guarantee. When it failed to do so it applied to the Singapore Court, which had issued the warrant of arrest, for an order for the release of the vessel on the basis of the bank guarantee it was able to provide. Ordinarily that application would have been dealt with promptly but the COVID 19 pandemic made that impracticable. At some stage Clearlake ought to have realised that there was in the circumstances no alternative to paying the sum demanded in to court. It does not appear to have realised that and that failure may have been a failure to comply with the mandatory injunction. To say that Clearlake deliberately decided not to put up security may be true in the sense that Clearlake may have chosen or decided not to pay the sum demanded in to court but that is not the whole story. It sought to agree the terms of a bank guarantee and was willing to have the arresting court decide whether the vessel should be released on production of the bank guarantee it was willing to provide. I would not have described such conduct as extraordinary but as responsible behaviour. Rather, it is the COVID 19 pandemic which caused the application to the Singapore Court not to be heard promptly which was extraordinary.

34. Clearlake's contractual obligation was, in those circumstances, to pay the sum demanded into court as security. To that extent its failure to pay into court was, at some stage in the narrative, a breach of contract. Reliance was placed by counsel for Trafigura on the decision in *National Westminster Bank v Rabobank* where Sir Anthony Colman noted, at paragraph 33, what he had said in an earlier case:

> "The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from ''the norm'' as to require judicial discouragement by more stringent means than an order for costs on the standard basis."

35. It is to be noted that indemnity costs were awarded not merely because there had been a breach of contract but because that breach entailed a misuse of judicial facilities, namely, the issue of proceedings before a court in breach of a contract not to issue such proceedings. That important element is not to be found in this case. There has been a breach of a contract but that is all. The question is whether that breach itself merits the award of costs on the indemnity basis. It is said that it does so because the purpose of the contract is to avoid proceedings of the type commenced by Trafigura in this court and to prevent Trafigura from being put to expense. But indemnity costs are appropriate when the conduct of a party in the proceedings is out of the norm in such a way as to merit indemnity costs. Where the issue of proceedings is itself a breach that test can be satisfied as Sir Anthony Colman explained. But that factor is not to be found in this case. Instead, Clearlake has failed to resist the order sought by Trafigura both at the ex parte hearing and at the inter partes hearing. But such failures

are not sufficient to merit an order for indemnity costs. A failed defence is not out of the norm.

36. Counsel for Trafigura submitted that it was not kept informed by Clearlake as to what was happening with regard to the provision of security. This was disputed by counsel for Clearlake who said Trafigura was kept informed. These conflicting submissions, I assume, mirrored a conflict in the evidence.

37. However, if it is correct that Trafigura was not kept informed of what was happening with regard to security, what is abundantly clear is that very full information was given for the purposes of the inter partes hearing following the serious criticism made of Clearlake by Trafigura.

38. Finally, there is the indemnity. I have borne this in mind as it was submitted that I should, but I do not think this assists the argument for the assessment of costs on an indemnity basis. If legal costs, reasonably incurred, can be claimed pursuant to this indemnity then Trafigura is able to do so in the course of the action. The existence of that additional remedy does not assist in enabling Trafigura to show that Clearlake's conduct of the proceedings is out of the norm.

39. Trafigura's costs will therefore be assessed on the standard basis.

40. Although Trafigura (and Petrobras) wished the court to assess costs summarily there was no time to hear detailed submissions on the costs. The parties had requested 2 hours and the hearing in fact lasted 3 and a half hours. I could not allow the hearing to continue any longer because of my other judicial commitments. There will therefore have to be a detailed assessment.

41. I now turn to the position between Clearlake and Petrobras.

42. Counsel for Clearlake sought an order (a) that Petrobras pay the costs recoverable by Trafigura and (b) that Petrobras pay all of the costs incurred by Clearlake in resisting the application of Trafigura and in pursuing Clearlake's claim against Petrobras.

43. I shall deal first with the claim against Petrobras in respect of Clearlake's own costs of its proceedings against Petrobras.

44. So far as Clearlake's claim against Petrobras is concerned Clearlake is entitled to (i) its costs up until 15 April 2020 and (ii) to 50% of its costs thereafter. The reasons why such an order is appropriate as between Trafigura and Clearlake apply equally as between Clearlake and Petrobras. Such costs should be subject to a detailed assessment on the standard basis.

45. So far as the costs of Clearlake's defence to the Trafigura claim are concerned, Clearlake says that because Petrobras refused to provide security on 17 March 2020, Clearlake was bound to resist the application by Trafigura. This is not accepted by Petrobras. Petrobras accepts that the consequence of what it said on 17 March was that Clearlake would pursue its claim for security against Petrobras. But whether Clearlake decided to resist the claim for security by Trafigura would depend upon the view that Clearlake took of its contractual duties to Trafigura. That is a matter for it to

assess. For that reason it was submitted that Petrobras' refusal on 17 March to provide security did not cause Clearlake to resist liability to Trafigura.

46. A similar argument developed with regard to Clearlake's argument that Petrobras should be ordered to pay Trafigura's costs pursuant to section 51 of the Senior Courts Act 1981 and *Aiden Shipping v Interbulk, The Vimeira* [1986] AC 965, alternatively that the costs of Clearlake payable by Petrobras should include the costs payable by Clearlake to Trafigura. It was common ground that such an order can only be made where in all the circumstances it is just to make the order.

47. The order made by Hirst J. at first instance in *The Vimeira* which was upheld by the House of Lords shows that there can be circumstances where it is just to order that an owner pay not only the costs of a charterer who successfully resisted an application by the owner but also the costs of the sub-charterer which, as between the charterer and sub-charterer, were payable by the charterer. The precise reasons which led Hirst J. to make the order are not stated in the report. But such an order may well be appropriate where a charterer who receives a claim from an owner passes on the same claim to the sub-charterer and at a combined hearing of the two applications simply adopts "down the line" the submissions made by the owner against the charterers and adopts "up the line" the submissions made by the sub-charterer against the charterer.

48. In the present case Clearlake wishes to pass on to Petrobras not only the costs it incurred as against Trafigura but also its liability to pay costs to Trafigura. I accept that the court has jurisdiction to make such orders if they are just in all the circumstances of the case.

49. On 17 March 2020 Petrobras informed Clearlake as follows:

> "We deny that Petrobras has any obligation to provide the requested security or that the Warrant of Arrest has been issued as a result of any action by Petrobras. Petrobras has at all times acted in accordance with its contractual obligations towards all parties concerned. We will strongly resist any attempts by Clearlake or any other party to argue to the contrary before the English courts or otherwise."

50. The decision of Petrobras not to provide security on 17 March 2020 must have been a cause of the decision by Clearlake to resist the making of an injunction ex parte on 24 March 2020. I accept that Clearlake could have decided that it owed a duty to Trafigura to put up security and decided not to oppose the application. But if Petrobras had accepted its obligation to provide security on 17 March it is more likely than not that Clearlake would not have incurred costs in defending the application brought by Trafigura.

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

52. I have therefore reached the conclusion that, with regard to the ex parte applications (the effects of which continued up until 15 April) Petrobras should pay, not only Clearlake's costs of the ex parte application against Petrobras, but also the costs Clearlake incurred in seeking to resist Trafigura's application and Clearlake's liability to pay the costs of Trafigura. That appears to me to be the just order.

53. It does not appear to be necessary to make Petrobras a party to the Trafigura action for this purpose.

54. With regard to the costs of the inter partes hearing, effectively those after 15 April, Petrobras should only pay 50% of the costs incurred by Clearlake in pursuing its claim against Petrobras. Petrobras should not be required to pay either Clearlake's liability to pay 50% of Trafigura's costs or Clearlake's own costs in seeking to resist the inter partes order. That appears to me to be the just order.

Payment on account

55. Since there must be a detailed assessment it is appropriate to order payments on account of costs. There was no dispute as to that.

56. So far as Trafigura is concerned its costs claimed against Clearlake total almost £188,000. I was told that some £80,000 related to the period before 15 April. It follows that over £100,000 relates to the period after 15 April. These costs were incurred in relation to an ex parte hearing and an inter partes hearing. Neither hearing was longer than one day. The former was considerably shorter than one day. Clearlake's costs were £110,000 in respect of Trafigura's claim and £176,000 in respect of its claim against Petrobras, making a total of some £286,000. Counsel for Petrobras described these levels of costs as "eye-watering". Petrobras' own costs of the inter partes hearing were some £97,000. Although that, as a figure, does not suggest that Trafigura's costs of the inter partes were high the court must take a wider view than simply comparing figures. The relief sought by Trafigura was not novel but orthodox, having been recognised by recent authority. The evidence required in support was limited. There is, it seems to me, a real prospect that on assessment the reasonable costs of proceedings aimed at securing such relief will be found to have been significantly less than those claimed by Trafigura and Clearlake.

57. Counsel for Trafigura submitted that an interim payment of at least £100,000 should be made as against Clearlake. Since Trafigura's total costs may well be substantially reduced when assessed on the grounds that they were objectively unreasonable in amount it is probably wise to work on a recovery of about 55%. But it has also to be remembered that Trafigura is only entitled to 50% of its costs post 15 April. I will therefore order a payment on account of Trafigura's costs in the sum of £72,000 (made up of £45,000 in respect of the period before 15 April and £27,000 in respect of the period after 15 April).

58. So far as Clearlake is concerned, its total costs are in the somewhat striking figure of £286,000. I accept that the claim for a variation in the order necessitated evidence by Clearlake but such evidence was in essence a chronological account of the steps taken to provide security. After assessment they are likely to be reduced further than Trafigura's, perhaps to something below 50%.

59. Petrobras must pay Clearlake's costs of the application against Petrobras up until 15 April and 50% of the costs incurred thereafter. Clearlake's schedule shows a total of £176,000. There is no breakdown of costs before and after 15 April. It is likely that the costs before were less than those after which suggests say, £76,000 before and £100,000 after. (A further schedule of costs incurred up until 31 March states the costs incurred in the claim against Petrobras were £74,000 so my estimate appears to be of the right order.) Allowing for (i) a less than 50% recovery after assessment and (ii) that Clearlake can only recover 50% of its costs post 15 April I have concluded that there should be a payment on account of some £60,000.

60. There must in addition be a payment on account of Petrobras' liability to pay for Clearlake's costs of resisting Trafigura's ex parte application and Clearlake's liability to pay costs to Trafigura in respect of that application. Winter Scott represented Clearlake until 13 April at a cost of some £28,000. Those costs do not seem excessive and therefore on assessment it is safe to assume that some 65% might be recovered, say £18,000. In respect of Clearlake's liability to Trafigura for costs before 15 April I have assessed a payment on account of some £45,000 to be made by Clearlake and so that same figure should be paid by Petrobras to Clearlake. The total figure to be paid on account under this head will therefore be £63,000.

61. In summary the payments to be made on account of costs are:

    i) By Clearlake to Trafigura in the sum of £72,000

    ii) By Petrobras to Clearlake in the sum of £60,000

    iii) By Petrobras to Clearlake in respect of Clearlake's costs of Trafigura's ex parte claim against Clearlake and for the latter's liability to pay costs in respect of the same in the sum of £63,000.

62. It is with some trepidation that I ask counsel to agree the form of order necessary to give effect to these rulings.