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Ever Given Salvage Contract Never Concluded

Focus has returned to the refloating of the Ever Given, with Singapore-based master mariner Donal Kearney summarising a United Kingdom Court of Appeal ruling on the contractual relationship between the vessel's owners and salvors.

At first instance in the Admiralty Court, Justice Baker concluded there was no legally-binding services contract between the appellants and respondents for refloating services in *SMIT Salvage BV & others v Luster Maritime SA & another (Ever Given – salvage claim)* [2024] EWCA Civ 260.

He found that instead, the respondents (salvors) were entitled to bring a claim for salvage under the terms of the International Convention on Salvage 1989 and/or at common law.

The appellants appealed, arguing that there was a refloating contract in place which would preclude any claim for salvage remuneration by the respondents. In a unanimous decision, the Court of Appeal dismissed the appeal.

The case stems from the grounding of the Ever Given in the Suez Canal in March 2021, which the respondents assisted in refloating and then brought a claim for salvage.

The appellants argued that the parties had concluded a contract for services in respect of the refloating and the payment for services should be based on the terms of that contract. The respondents argued there was no binding services contract and that payment should be based on the criteria for fixing salvage remuneration.

Captain Kearney of international legal firm Hill Dickinson says a critical point about salvage remuneration is that the law applies a financial uplift to encourage the provision of salvage services. Consequently, a salvor can expect to receive more in the context of salvage remuneration than pursuant to a negotiated services agreement for the same operation.

The question before the court at first instance was whether a contract had been concluded. A contract is a legally-enforceable agreement and for there to be a contract, there must be:

(a) an offer;

(b) acceptance;

(c) consideration,

(d) the intention to create legal terms; and

(e) certainty of terms.

The court has said:

> The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable … In general, the agreement necessary for a contract is reached either by the parties signing a document containing agreed terms or by one party making an offer which the other accepts. Acceptance may be by words or conduct.

It is insufficient for parties to "agree to agree" on the terms and conditions, the parties must "agree" on what it is that they have agreed upon. The law does not recognise in such a context, a "contract to enter into a contract". If it were the case that no services contract had been agreed, the question would be, "did the assistance fall with the scope of salvage services?"

The court quoted from the practitioner text, *Brice on Maritime Law of Salvage, 5th Ed*:

> In English law a right to salvage arises when a person, acting as a volunteer (that is without any pre-existing contractual or other duty so to act) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognized object of salvage from danger.

It is well-settled law that "at sea" includes tidal river or canal waters, so therefore the Suez Canal falls within the definition.

Key here is the word "volunteer". If the appellants and the respondents had concluded a legally-binding services contract, then the respondents were not volunteers and could not claim a salvage reward, they could only seek payment based on the terms of the agreed contract.

The International Convention on Salvage 1989 reflects Brice's definition, expanding the assistance part of the definition slightly to: "Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever."

With respect to danger, the court has held that there must be danger or the apprehension of danger. In this context, it would be sufficient that the vessel would not have come free without the provided services.

Justice Baker was satisfied that, while the parties had reached agreement on the remuneration terms for a contract, they were still negotiating the contract terms by which they were willing to be bound, when the vessel was refloated on 29 March 2021. The court found, based on the foregoing, that no contract for services had been concluded, leaving the respondents free to pursue a claim for salvage.

In the Court of Appeal, the appellants concentrated their appeal on ultimatums given by SMIT on the morning of 26 March 2021, the first by phone and then two by E-mail as follows:

- "As discussed we need to have an agreement with owners by 12:00 Dutch time today. Otherwise we will have to take a firm position and stand down our operations to protect our interest."
- "With the world watching us and presently having our hands tied behind our backs failing the requested confirmation of either a commercial agreement or LOF [Lloyd's Open Form] we may be left with little choice [but to stand down] as relayed by Jody."

Approximately one hour after the E-mail containing the third ultimatum was sent, the parties agreed terms on several fronts, including remuneration. However, agreement had not been reached on several significant issues such as the scope of services to be provided, the standard of care which the respondents would be obliged to undertake and the payment terms.

Following the agreement in respect of remuneration, the respondents took various steps in furtherance of the efforts to refloat the vessel, including the chartering of two tugs, at considerable expense.

The appellants argued that the conduct of the respondents, which were now expanding their activities and were no longer issuing ultimatums, demonstrated that the respondents were satisfied that a contract had been concluded, providing them with the security they needed to progress their work to refloat the vessel.

In response, the respondents highlighted their expressed preference for "no-cure no-pay" LOF terms in early correspondence, submitting that their approach was consistent and highlighting that it was typical for a salvor to mobilise on speculation, prior to an agreement being concluded.

The respondents further submitted that in correspondence between the parties, “ironing out the terms” of the services agreement was evidence of the appellants’ contemplation that further terms, beyond remuneration, were yet to be agreed.

Following the appellants’ counter offer in respect of a reflotation bonus, it was the position of the respondents that while agreement of remuneration was a necessary step towards the conclusion of a contract it could not be viewed, and was not intended to be, the culmination of negotiations.

In dismissing the appeal, the Court of Appeal held (unanimously) that the appellants had fallen considerably short of their burden to evidence that the parties’ exchanges demonstrated an unequivocal intention to enter into a binding contract. The respondents did not at any time indicate that they would be satisfied to be bound after dealing with remuneration only, it being clear that they had in mind to address several other terms as well.

The court agreed that the decision to fix additional tugs after remuneration was agreed was not made because of contractual certainty, but in response to the failure of the refloating attempt of 26 March 2021, which put the respondents in a strong commercial position, giving them a reasonable expectation of a salvage award if the parties did not conclude a contract.

Captain Kearney says the decision (together with that of the Admiralty Court, at first instance) provides insight into the court’s analysis of pre-contractual correspondence between parties, to determine whether a contract has been concluded.

It also serves to demonstrate the complexities, and difficulties, of negotiating a services contract for a refloating operation where time is of the essence.

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