

09 May 2023

CIF Weekly – issue 28

Smit Salvage B.V. and ors v Luster Maritime S.A. and ors [2023] EWHC 697 (Admlty)

The High Court has found, following trial of a preliminary issue, that an exchange of emails between shipowners and a salvor did not result in a contract for salvage services. It was therefore open to the salvor to make a claim under the International Convention on Salvage 1989 and/or at common law.

Background

This case arose out of the grounding of the m.v. *Ever Given* (the '**Vessel**') in the Suez Canal on 23 March 2021.

The first claimant ('**SMIT**') assisted in the successful refloating of the Vessel. The defendants were co-owners of the Vessel ('**Owners**').

SMIT claimed salvage under the terms of the International Convention on Salvage 1989 (the '**Convention**') and/or at common law. Owners resisted the claim on the basis that the assistance provided by the Claimants was under a contract concluded on 26 March 2021.

Under English law, a right of salvage cannot arise where the salvor is under a contractual duty to provide the relevant assistance (in which case the salvor would only have a claim in contract). It can only arise where the salvor acts as a volunteer.

As a preliminary issue, Mr Justice Andrew Baker ruled on whether a binding contract for salvage services was concluded on 26 March 2021 by an exchange of emails between: (i) SMIT; and (ii) a Captain Sen on behalf of the claims manager acting as agent for Mitsui Sumimoto Insurance Co. Ltd., hull and machinery underwriters for the Vessel ('**Captain Sen**').

Chronology

The Vessel ran aground on 21 March 2021 at about 05:40 UTC. Shortly afterwards, Captain Sen, on behalf of Owners, requested SMIT's assistance with

technical advice and potential salvage assistance. Over the following days, Captain Sen and SMIT exchanged emails on the matter and a SMIT team was deployed to the Vessel.

On 25 March, SMIT provided to Owners a commercial proposal (the '**Proposal**'), a draft salvage plan, and an amended WRECKHIRE 2010 form with additional clauses.

On 26 March, Captain Sen replied to the Proposal, setting out terms from Owners, including personnel payment and refloating bonus. Within minutes, SMIT confirmed its agreement to these remuneration terms and said that, once it had received Owners' feedback to the Proposal, it would prepare a draft contract. On Owners' case, it was at this point that the contract for salvage services was concluded. The relevant email correspondence is set out as an appendix to this article, for ease of reference.

In the event, SMIT rejected Owners' response to the Proposal. By the time the Vessel was refloated on the afternoon of 29 March (partly as a result of SMIT's efforts which had been ongoing during the negotiations), the parties had not reached agreement. Following the refloating of the Vessel, SMIT asserted a claim for salvage, citing the lack of a signed contract.

Dispute

Owners' case was that the parties had concluded a contract for salvage services on 26 March when SMIT agreed to the remuneration terms, and it was therefore not open to SMIT to claim salvage under

the Convention and/or at common law. SMIT rejected this, saying that the parties had only intended to be bound to a contract for salvage services upon the signing of a negotiated Wreckhire contract.

Law

Andrew Baker J summarised the test for whether a contract had been concluded: if the parties communicated with each other so as to indicate that: (i) they had reached agreement on terms sufficient in law and; (ii) that they intended to be bound by those terms immediately, then a contract would come into existence. This would be the case regardless of whether any further, more detailed, terms were later agreed.

The test is an objective one, and the Court must have regard to the entirety of the parties' communications on the matter. As long as the requirements for a binding contract have been met, it does not matter if some significant terms, including economic terms, have not been agreed.

Decision

The key question was whether the email correspondence evinced an intention by the parties to be bound immediately. The Owners' case was that it did, and that therefore a contract had been concluded on 26 March. There was no alternative claim that a contract had been concluded on any other date.

It was held that the parties had reached agreement on remuneration, but that such agreement was necessary in order to enable them to negotiate the detailed contract terms by which they intended to be bound. Agreement on remuneration alone, however, did not constitute a contract for salvage services. The judge's view of the email correspondence was that the parties had made it clear to each other that negotiations were still ongoing, and the parties did not intend to be bound unless and until those negotiations had been completed and a detailed set of contract terms agreed.

The fact that SMIT had undertaken salvage work did not alter the position. The judge found that the negotiations and the work were parallel endeavours. The fact remained that the negotiations had not resulted in an agreement, and therefore a contract for salvage services had not come into existence.

Comment

This case is an example of a common situation where it is unclear whether a contract has been concluded via an exchange of messages. We tend to see cases where a party has inadvertently concluded a contract in this way, but this case is a mirror image of that situation.

The use of heading correspondence "subject to details" can be useful in making clear that the intention is to be bound only where a fuller set of contract terms is also agreed. However, as this case shows, there is no rule that a failure to label correspondence "subject to details" means that the parties intended to be bound immediately. Therefore, even if the words "subject to details" are not used, the Court may find that any agreement reached in correspondence is, indeed, subject to details and therefore not a binding contract.

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

Appendix

Email from Captain Sen to SMIT, 26 March 2021 11:35 UTC:

"As agreed over phone, I am please to confirm as below on behalf of Owners of Ever Given.

Owners agree to the following :

The tugs, dredgers, equipment engaged by SCA and their subsequent salvage claim are separate to the Smit's offer of assistance.

- a) SMIT personnel and equipment to be paid on Scopic 2020 rates*
- b) Any hired personnel and equipment, out of pocket expenses of SMIT to be paid on scopic 2020 rate + 15% uplift*
- c) Refloatation Bonus of 35% of Gross invoice value irrespective of the type of assistance rendered.
 - ci) Refloatation bonus not to be calculated on amounts chargeable for quarantine or isolation waiting period.*
 - cii) Refloatation bonus to SMIT will be applicable if refloatation attempt by SCA on 26 March 2021 is unsuccessful.**

We look forward to your confirmation. We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest."

Email sent on behalf of SMIT, 26 March 2021 11:40 UTC:

"Thank you Captain and confirmed which is very much appreciated. I shall inform our teams accordingly and we shall follow up with the drafting of the contract upon receipt of your/your client's feedback to our draft as sent last night."