WHAT'S THE BILL? SALVAGE OF THE EVER GIVEN

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In *Smit Salvage BV v Luster Maritime SA*[1], the UK Court of Appeal considered whether there was a legally binding contract between a salvage company and the owners of the EVER GIVEN and whether this substantially reduced the money payable to the salvage company.

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BACKGROUND

The EVER GIVEN, an ultra-large container ship, grounded in the southern section of the Suez Canal on 23 March 2021. This was a high-profile incident, where time was of the essence to refloat the vessel. After several attempts, the ship was refloated on 29 March 2021. SMIT, a leading salvage company and certain other parties assisted with the salvage, in part through the provision of two tugs ALP GUARD and CARLO MAGNO. These tugs arrived on 29 March and took part in the successful refloating.

Under English common law, a shipowner has a liability to pay a sum (not exceeding the value of the saved property) to any volunteer who has contributed to saving their ship from a danger or peril. A volunteer is a person who acts without any pre-existing contractual or other duty to act. There is no salvage payment if the ship is not saved.

In the case of the EVER GIVEN, the owners agreed that SMIT had contributed to the salvage effort. However the parties did not agree on how much money SMIT should receive.

The owners said SMIT agreed to limit the payment in a contract on the Wreckhire 2010 form. This was because SMIT preferred an agreed payment, rather than possibly receive nothing at all.

However, SMIT said that at the time of refloating there was no final agreement on the wording of the draft Wreckhire contract. Accordingly, they were entitled to a more lucrative sum (i.e., up to the value of the property saved).

A claim for salvage was brought in the English court. This was pursuant to an agreement that SMIT's salvage claim would be determined by the English court in accordance with English law and practice, which was entered into by the parties in June 2021. The court ordered a trial of a preliminary issue as to whether there was a binding contract in place, no doubt to save time and cost.

ADMIRALTY COURT

Mr Justice Baker held that the parties had not communicated their intention to be bound by a contract. By considering the words and conduct of the parties, any consensus on the price was subject to agreement of the further detailed set of terms in the draft Wreckhire contract. SMIT could claim sums under the International Convention on Salvage 1989 ("Convention") and/or at common law.

The owners appealed.

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COURT OF APPEAL

The owners submitted that the judge was incorrect in his conclusion and that the parties had reached a binding agreement through a chain of emails, notwithstanding that the intention was to subsequently agree a more detailed contract. The Court of Appeal noted that the issue did not depend on any oral evidence but simply an analysis of the written exchanges. As a result, it was as well placed as the judge at first instance to consider the issue.

On the facts, SMIT sent various chasers/deadlines to agree terms. If the deadline was not met, SMIT said they would no longer assist. However, once the parties agreed the terms of remuneration, SMIT stopped chasing with the same urgency as before. The owners said this was clear evidence the parties reached a consensus as to all the essential terms of the contract.

The Court of Appeal dismissed the appeal on the following basis:

"When a binding contract exists and pursuant to what terms though, is not always clear, in part because more negotiation is needed in a time-pressured situation."

1. the burden was on the owners to prove there was a binding contract;
2. the court accepted the urgency to conclude a contract did not continue with the same intensity after the parties reached the agreement on renumeration. However, it did not accept that this indicated that a binding contract had been concluded. This was more likely explained by the fact there was a failed refloating attempt around the same time. This put SMIT in an even stronger commercial position. The vessel still urgently needed refloating and at that time, SMIT was the only realistic option to do this, with the assistance of their two chartered tugs. SMIT were less concerned with the owners agreeing to their proposed terms because the salvors' involvement was looking less speculative, and they were likely to receive an award through the common law/convention route. SMIT preferred to receive a potentially more lucrative payment on that basis; and
3. agreement on renumeration was a first step to agreeing the contract, but this was not the end of the story. There were further terms to be agreed, with the involvement of lawyers, including the scope of services to be provided and the payment terms. SMIT had never suggested that an agreement only on remuneration terms was sufficient.

The Court of Appeal held that no binding contract was concluded.

CONCLUSION

It is common for parties to agree to a Lloyds Open Form contract for salvage operations. This can be quickly agreed, without the need to negotiate its terms. That said, there might be obvious commercial reasons for salvors and owners to fix rates at an early stage, for example where there is no guarantee the ship will be saved.

When a binding contract exists and pursuant to what terms though, is not always clear, in part because more negotiation is needed in a time-pressured situation. Each case will turn on its own particular facts. As highlighted in the case of EVER GIVEN, the court will consider whether the parties had intended for the contract to be binding through an analysis of the parties' words and conduct in the whole course of the parties' negotiations.

Marine Manager Michel Farach also contributed to this article.

FOOTNOTES

[1] [2024] EWCA Civ 260

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