Neutral Citation Number: [2024] EWCA Civ 260

Case No: CA-2023-000798

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
ADMIRALTY COURT
Mr Justice Andrew Baker
[2023] EWHC 697 (Admlty)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2024

Before:

LADY JUSTICE KING
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

- -

Between:

1) SMIT SALVAGE B.V. **2) BAGGERMAATSCHAPPIJ BOSKALIS B.V.** **3) OCEAN MARINE EGYPT S.A.E.** **4) AUGUSTEA SHIP MANAGEMENT SRL**	**Respondents/ Claimants**

- and –

1) LUSTER MARITIME S.A. **2) HIGAKI SANGYO KAISHA LIMITED**	**Appellants/ Defendants**

M.V. EVER GIVEN – Salvage Claim

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- -

Luke Parsons KC, Nigel Jacobs KC & Caroline Pounds (instructed by **Stann Law Limited**) for the **Appellants**
Jonathan Gaisman KC, Elizabeth Blackburn KC & Andrew Carruth (instructed by **Holman Fenwick Willan LLP**) for the **Respondents**

Hearing date: 7 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 19 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. The issue on this appeal is whether the parties concluded a legally binding contract as to the remuneration which would be paid to the respondent salvors for services to be provided in re-floating the M.V. 'EVER GIVEN', a container ship which had grounded and was blocking the Suez Canal. The appellants, the owners of the 'EVER GIVEN', contend that such a contract was concluded, leaving other contractual terms to be agreed at a later stage (although they never were), and that its effect is to preclude a claim for salvage under the International Convention on Salvage 1989 or at common law. The salvors say that no such contract was concluded and that they are therefore able to bring their claim for salvage services rendered, with the quantum of their claim to be determined by the Admiralty Court.

2. The Admiralty judge, Mr Justice Andrew Baker, held that no such contract was concluded. He did so on the ground that although what the parties agreed was capable of amounting to a contract as to the remuneration payable to the salvors for any services which they provided, the parties did not on an objective view intend that agreement to be legally binding until the remaining terms (including as to what services the salvors would provide) were also agreed. The owners now appeal to this court.

Background

3. The 'EVER GIVEN' is a container ship, 399.98 metres long and 58.80 metres broad, of 199,489 DWT on a draught of 16 metres, and with a container capacity of 20,388 TEU. She was co-owned by the defendants, based in Japan, and managed by their associated company, Shoei Kisen Kaisha Ltd ('SKK').

4. On Tuesday 23rd March 2021 'EVER GIVEN' was part of the morning northbound convoy making its way up the southern section of the Suez Canal. At about 05:40 UTC (07:40 local time), she grounded about 200 metres north of the 151 kilometre mark, blocking the Canal in one of its narrowest sections. The blocking of the Canal made headlines around the world. Refloating the ship was an urgent priority.

5. The Suez Canal Authority (the 'SCA') reserves to itself exclusive authority to order and direct all operations required to refloat a ship grounded in the Canal. Under such direction, 'EVER GIVEN' was refloated at about 13:05 UTC on Monday 29th March 2021. She proceeded to the Great Bitter Lake, safely anchoring there by about 17:00 UTC that day.

6. The first claimant ('SMIT') is a leading maritime salvage company. By the time 'EVER GIVEN' refloated, SMIT had a team on board (with onshore support from Holland) and two chartered tugs, 'ALP GUARD' and 'CARLO MAGNO', contributing to the salvage effort. It does not appear to be disputed that SMIT's involvement contributed to the successful refloating, although the extent of that contribution is disputed.

7. By a written Jurisdiction Agreement dated 25th June 2021 it was agreed that SMIT's claim for salvage, including whether its services were in the nature of salvage, would be determined exclusively by the English court in accordance with English law and practice. As recorded in that agreement, SMIT says that it rendered services entitling it to salvage, while the owners contend that the services rendered by SMIT were not salvage services but services performed pursuant to a pre-existing contract.

8. The significance of this issue is explained in *Brice, Maritime Law of Salvage*, 5th Ed (2012), para 1-01:

> '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 recognised object of salvage from danger. In the absence of a binding agreement fixing the amount of remuneration, the salvor, upon the property being salved and brought to a place of safety, is entitled to recover salvage remuneration not exceeding the value of the property salved assessed as at the date and place of the termination of the salvage services. In the absence of success or a contribution to ultimate success, the person rendering the services, however great his exertions, is entitled to no reward; this is the principle of "no cure-no pay".'

For these purposes, the sea includes tidal river or canal waters such as, in this case, the Suez Canal.

9. As the 'EVER GIVEN' was successfully refloated and brought to a place of safety, SMIT will potentially be entitled, if the services it provided were salvage services, to remuneration up to the value of the property salved. However, if it was acting pursuant to a binding agreement fixing the amount of its remuneration, it will be limited to what was agreed.

10. Whether a binding contract fixing the remuneration had been concluded was tried by the judge as a preliminary issue.

The alleged contract

11. The owners' case is that a binding contract was concluded by an exchange of emails on 26th March 2021 as follows:

(1) An email sent at 11:35 UTC, from Captain Saumitr Sen on behalf of WK Webster & Co Ltd, a claims manager acting as agent appointed by the owners' hull and machinery underwriters, to Mr Richard Janssen (Managing Director of SMIT) and Mr Jody Sheilds (also of SMIT), copied to various others, stating:

> 'We refer to our telephone conversation subsequent to my previous email and my further conversation with Japan. As agreed over phone, I am pleased 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.'

(2) Mr Janssen's reply, sent at 11:40 UTC and stating:

> '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.'

12. It will be necessary to consider the circumstances in which these emails came to be sent, but in the meanwhile some of the matters referred to need explanation.

13. The parties were aware that an attempt was to be made by the SCA to refloat the vessel on 26th March 2021, the day on which these emails were sent, and that this would take place before any tugs chartered by SMIT could arrive on the scene. They were aware also that previous attempts had been made without success. It was therefore agreed that if this next attempt was successful, the 'refloatation bonus' would not be payable. SMIT may well have thought that it would lose nothing by agreeing to this term, as the attempt to refloat using the same resources as had already failed would be equally unsuccessful.

14. SCOPIC 2020, referred to in Captain Sen's email, is the SCOPIC Clause (2020 version), designed to supplement a main agreement on the terms of the Lloyd's Form Salvage Agreement 'No Cure – No Pay' ('Lloyd's Open Form' or simply 'LOF' terms). SCOPIC 2020 rates, therefore, are the rates set out in Appendix A to SCOPIC 2020, which include standardised daily rates for various types of personnel and for tugs (with a wide definition stated of what is treated as a tug). The daily rate for a tug (with fixed uplifts for fire fighting and ice breaking) is calculated on its certificated bhp (US$3.29 per bhp up to 5,000, plus US$2.35 per bhp over 5,000 and up to 12,000, US$1.65 per bhp over 12,000 and up to 20,000, and US$0.82 per bhp over 20,000).

15. The 'draft as sent last night', referred to in Mr Janssen's email, was an email from Mr Dave Wisse of SMIT to Captain Sen, sent at 21:40 UTC on 25th March 2021. It was copied to various others, including Messrs Janssen and Sheilds of SMIT and Messrs Isawa and Tsuyama of Mitsui, the hull and machinery underwriters. It was also forwarded by Mr Sheilds to Mr Faz Peermohamed of Stann Law Limited, the owners' solicitors. It attached:

(1) a detailed, three-page 'commercial proposal';

(3) an eleven-page 'DRAFT Salvage Plan'; and

(4) a draft amended Wreckhire 2010 contract form, with a three-page set of draft Additional Clauses 27 to 36 intended to go with it.

16. The commercial proposal set out, under a heading of 'Commercial terms and conditions on daily hire basis', what it described as a summary of the 'main terms and conditions' of SMIT's proposal, in the form of seven bullet points (including eight sub-points):

> • Contract: Wreckhire 2010, logically filled and amended. For your review, please see enclosed the proposed draft wording of the contract stating all relevant contracting details. [original emphasis]
>
> • Contractor: SMIT Salvage BV
>
> • Nature of Services:
>
> o Assessment of the Vessel's condition
>
> o Preparation of the Vessel for refloating (e.g. by shifting or discharging ballast water/fuel);
>
> o Coordination and liaising with SCA arranged tugs and Contractors' tugs;
>
> o Cargo lightening and/or dredging (if required);
>
> o Delivery of the Vessel;
>
> o Liaising with and cooperating with the relevant authorities, including SCA.
>
> • Contractor's Craft, Equipment and Personnel: at SCOPIC 2020 rates with no uplift, commencing from start mobilisation until completion of demobilisation (including any waiting time/delays due to Covid-19 procedures, quarantine, etc);
>
> • Third party Craft, Equipment and Personnel: at cost + 15% uplift;
>
> • Refloating bonus: 35% of the sums due in the final agreed Running Cost Sheet;
>
> • Payment:
>
> o First 3 days on signing of this Agreement;
>
> o Thereafter in advance every 7 days for subsequent invoices based on the Running Cost Sheet.'

17. Comparison of the emails alleged by the owners to constitute a binding contract with the 'draft as sent last night' reveals how much the emails of 26th March did not say. Thus the alleged contract was concerned only with the remuneration which would be payable to SMIT, but said nothing about such basic matters as the nature of the services which SMIT would provide, the standard of care which it would be required to exercise, and the payment terms, and it left for future agreement a detailed contract on the Wreckhire 2010 form. Indeed, the owners' case by the conclusion of the trial of the preliminary issue was that the contract concluded did not oblige SMIT to do anything at all. The judge described their case in this way:

> '20. As reformulated for closing, the defendants' primary case is now that there was no agreement on the (scope of) services to be provided by SMIT, and no obligation on SMIT to provide services. Rather, now the alleged "Main Terms' Agreement" is said to be just an agreement as to how remuneration would be calculated for any salvage services in fact provided by SMIT.'

The law

18. The principles to be applied in deciding whether parties have concluded a legally binding contract even though they recognise that some matters are still to be agreed are well established and were not disputed. The leading cases are *RTS Flexible Systems Ltd v Molkerei Alois Mueller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753, *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, and *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37, [2017] 4 WLR 163).

19. In summary, it is well established that the whole course of the parties' negotiations must be considered; that it is possible for parties to conclude a binding contract even though it is understood or agreed that a formal document will follow which may include terms which have not yet been agreed; that whether this is what the parties intend to do must be determined by an objective appraisal of their words and conduct; and that the burden lies on the party asserting that such a contract has been concluded to establish that it has.

20. There are well-known formulae which can be used to make clear that parties have not yet reached the stage of a binding contract, such as 'subject to contract' or, in a maritime context, 'subject details' or 'fixed on subjects', but the absence of such terms (which were not used in the present case) is not decisive. All depends on the parties' words and conduct towards each other, considered in their context.

21. For the owners, Mr Luke Parsons KC relied in particular on two cases in a salvage context in which the question arose whether a contract had been concluded for the provision of services without agreeing a full set of detailed contract terms or signing a written contract. In *The Kurnia Dewi* [1997] 1 Lloyd's Rep 552 Mr Justice Clarke held for jurisdictional purposes that there was a good arguable case that a contract had been concluded whereby the salvors would mobilise immediately, before a contract had been concluded for the removal of a wreck or a permit had been issued by the Indonesian authorities, on the basis that they would be paid reasonable remuneration for doing so if (without their fault) a permit was not issued or a formal contract was never concluded. I do not find this case helpful. Whether any such contract was concluded depended on the parties' detailed exchanges in the circumstances of that case, and in any event Mr

Justice Clarke's conclusion was no more than that there was a good arguable case that a contract was concluded. He was careful to say that he expressed no view as to the likely outcome of any trial. It was, moreover, not strictly a salvage case, but was concerned with wreck removal.

22. In the second case, *The Athena* [2011] EWHC 589 (Admlty), [2011] 1 CLC 425, it was common ground that a binding agreement had been concluded for the provision of firefighting services, which the parties intended to be recorded in a detailed formal contract. The issue was whether the parties' email exchanges demonstrated an intention that the initial agreement impliedly incorporated the terms of the BIMCO Wreckhire Standard Form of Contract, which included an arbitration clause. Mr Justice David Steel held that they did. That issue is some way removed from the circumstances of the present case.

23. Each of these cases turned on its own particular facts. As there is no doubt that it is possible for parties in a salvage context to conclude a binding contract to the effect alleged in the present case if that is what they want to do, it is necessary to examine the parties' exchanges over the course of their negotiations in order to ascertain what their intentions were in this case.

The parties' exchanges

24. I begin with some background, explained by the judge and not disputed:

> '44. The background against which the parties conducted their correspondence, said to have resulted in a contract, was that:
>
> (i) Each side was familiar with salvage operations, and with LOF, SCOPIC and Wreckhire terms, and was aware of that familiarity on the other side.
>
> (ii) If SMIT were engaged on LOF terms, or provided salvage services without any contract, they would run the "no cure – no pay" risk that if Ever Given was lost, or if she was salved but SMIT had not contributed, they might not be paid, but they might still have incurred significant costs. On the other hand, there was the prospect of reward on the basis of a LOF or common law salvage claim, which had the capacity at least to be significantly more profitable for SMIT than remuneration on a contractual basis, particularly if the salvage effort was not prolonged.
>
> (iii) The Ever Given grounding was a high profile incident, globally, in which on all sides time was perceived to be of the essence in trying to get the ship refloated.
>
> (iv) Any refloating operation would ultimately be under the direction and control of the SCA. The defendants and their underwriters were not the only interested parties in a position to be offered assistance by SMIT and to be willing, potentially, to pay for such assistance.

…

> 47. … in the salvage context, a consent to mobilisation and the provision of assistance, or actual mobilisation and assistance, does not imply the existence of a contract. Other things being equal, it is not consistent only with an intention to be bound there and then, but is reasonably explicable by the hope of concluding a contract and a willingness to leave rights and liabilities to some applicable general law of salvage if in the event no contract is concluded.'

Tuesday 23rd March 2021

25. The first contact between the parties was on the afternoon of 23rd March 2021, only a few hours after the grounding, of which SMIT was already aware. Captain Sen sent information about the condition of the ship and requested some technical advice, possibly with salvage assistance to follow. He said that the owners wanted to engage SMIT on the basis of standard SCOPIC rates with a 15% uplift for out-of-pocket expenses. SMIT indicated a willingness to work on this basis and began to prepare a team to mobilise to the casualty. The owners provided further information, including what had been done to deballast and debunker the ship and its stability as a result of these operations.

26. The first attempt to refloat the ship, undertaken by the SCA with locally available tugs at about 19:00 local time (17:00 UTC), was unsuccessful. A second attempt was planned for the following morning. SMIT advised that it was seeking to source more powerful tugs which could be made available to assist in refloating, although these would not arrive in time for the planned second attempt.

Wednesday 24th March 2021

27. At 07:09 UTC on 24th March 2021, Captain Sen confirmed that he wanted a SMIT team 'to attend on board [to] assess the grounding, assist Master and SCA with on site recommendation for quick refloatation". He said that 'Although we had verbally discussed [a reference to an initial telephone call the previous day], the costs of your personnel will be scopic rates and out of pocket expenses on usual uplift of 15%', and that 'We wait for your confirmation in writing, along with passport details of the attending personnel'.

28. In response, Mr Wisse on behalf of SMIT urged what were described as 'the obvious advantages of an LOF contract in this matter (many as you know, but foremost the advanced speed of getting the right resources on site timely)'. He explained that, based on initial calculations, the ship appeared to be very hard aground, so that lightering of bunkers and/or containers and/or dredging operations around the ship might be required. Nevertheless, he confirmed that 'we will continue to mobilize our team towards the casualty based on below daily hire scheme'.

29. Captain Sen responded that the SCA was regarded as the main salvor as it had control of the canal, but that 'Owners and Underwriters want to give whatever professional assistance that can be given to refloat the vessel', and asked SMIT, if possible, to arrange for a dive survey even while the SMIT team was still *en route*. Mr Janssen in

reply acknowledged the SCA's control of the situation, but emphasised SMIT's ability to work with the SCA and its experience of being engaged by the SCA, including on LOF terms. He therefore proposed that, 'to avoid a chicken and the egg situation [*sic*] we would require an appointment letter or contract from the Owners with which we approach the SCA and work out a path forward'. Captain Sen replied, confirming that a suitable letter from EVER GIVEN's owners or managers had been requested and would be provided as soon as it was to hand.

30. At 12:03 UTC Mr Wisse sent Captain Sen a detailed proposal from SMIT as to 'the commercial way forward in this matter'. Among other things:

(1) It provided for a contract to be concluded on the Wreckhire 2010 form, 'logically filled and amended'.

(2) It provided for SMIT and Nippon Salvage, with whom SMIT had been in contact, to act as co-salvors.

(3) It identified the services to be provided:

> 'Scope:
>
> Assessment of Salvage team on board, possibly including a dive survey by a local dive team
>
> Preparations for refloating by pulling only (by e.g. shifting or discharging ballast water/fuel)
>
> Refloating by pulling only (coordination by the salvage team with the SCA tugs and Contractor's mobilised additional tugs)'

(4) It provided for daily hire rates for personnel and equipment in accordance with SCOPIC 2020 and for reimbursement of out-of-pocket expenses at cost plus 15%.

(5) It provided for a refloating bonus of 25% on the gross revenue of the total contract value.

(6) It included payment terms.

(7) It provided that other services, such as cargo lightering and/or dredging were not included in the proposal, and that in such a case 'we would like to keep the option open to change the contract form into an LOF'.

31. As the judge observed at [54], this proposal was not said to be 'subject to contract', and was an offer to conclude a contract, without more ado, which was capable of being accepted.

32. During the afternoon and evening of 24th March there were further exchanges between the parties. Mr Wisse sent Captain Sen operational updates on the progress of the team mobilising to the casualty and on tug options that SMIT had identified that might assist in refloating efforts. Captain Sen sought and obtained clarification of SMIT's offered terms as to the scope of services, in particular that 'pulling only' included all kinds of operations by tugs only, the intention being to exclude refloating by means of cargo

lightering, bunker lightering and/or dredging. In providing this clarification, SMIT said that it would make it 'crystal clear' in the Wreckhire contract what services were to be provided. Captain Sen notified SMIT that the owners might engage the tug 'RED SEA BRIGAND' for the following morning's refloating attempt. However, SMIT's offer of commercial terms was not accepted by the owners. It remained on the table, awaiting a response.

Thursday 25th March 2021

33. At 06:56 UTC on 25th March 2021, with a response to SMIT's offer still awaited, Captain Sen asked Mr Wisse to engage the 'RED SEA BRIGAND', if the SCA would allow it to assist in the attempts to refloat the 'EVER GIVEN'. In response, Mr Wisse confirmed that a charter for that tug was being drafted, and stated that:

> 'As discussed, it is important that we receive your / owner's formal response to our commercial proposal sent yesterday. We need some kind of assurance before we can ramp up our mobilization efforts and make out of pocket expenses, trust you will understand. Also the Wreckhire wording needs to be discussed/negotiated between the parties, I believe this is being prepared in the background by respective legal experts. …".

34. He added that SMIT's understanding was that the owners had cancelled the involvement of Nippon Salvage, and sought clarification.

35. At this stage, therefore, SMIT was chasing a response to its offer of commercial terms based on Wreckhire. It said that it wanted a 'formal response' that would provide 'some kind of assurance' before it would 'ramp up' its efforts further. It also indicated that there would or might be more to completing those negotiations than making logically necessary amendments to the Wreckhire 2010 Form. The Wreckhire wording was now something to be discussed and negotiated, with the involvement of lawyers.

36. This was, therefore, the first indication that SMIT was not necessarily prepared to commit itself fully to the refloating effort without progress on reaching an agreement as to the basis on which it would be acting.

37. Captain Sen replied at 07:34 UTC promising to revert on 'your Wreckhire offer' as soon as possible; and Mr Wisse forwarded SMIT's commercial proposal to the defendants' solicitors.

38. A response to SMIT's offer came at 08:08 UTC in an email from Captain Sen to Mr Wisse:

> 'Instructions from Japan regarding your formal offer is as below:
>
> Smit personnel to attend on site, discuss situation and operation with SCA.
>
> Smit to send report on prospects/plan etc ASAP after the meeting.

> Decision on refloatation bonus etc. will only be taken after receipt of this report during Owners casualty meeting at 0900 hrs tomorrow [presumably a reference to Japan time].
>
> No proposal of LOF will be acceptable at present.'

39. At this stage, therefore, the owners wanted SMIT's continuing assistance, but were not prepared to accept its proposal or even to make a counter offer. Nor were they willing to agree to a contract on LOF terms.

40. At about 10:00 UTC the SMIT team arrived on board 'EVER GIVEN', and discussion of tug options in the area continued. In the event SMIT did not charter the 'RED SEA BRIGAND', as she was engaged to assist by the SCA.

41. This was how matters stood at 21:40 UTC when Mr Wisse sent a revised commercial proposal, the 'draft as sent last night' described at [15] and [16] above, which now included a detailed Wreckhire wording. Like the proposal sent at 12:03 on 24th March which it replaced (see [30] above), it was an offer capable of being accepted so as to give rise to a binding contract.

42. Captain Sen replied at 22:28 UTC (which was 07:28 on the morning of 26th March in Japan), promising to 'revert on your proposed commercial offer asap'. It was to be expected, therefore, that the owners in Japan would be able to respond to SMIT's offer by opening of business in Europe on the morning of 26th March. However, this did not happen.

Friday 26th March 2021

43. Instead, at 03:39 UTC, Captain Sen sent a message referring to two of the tugs whose possible engagement the parties had been discussing. He asked Mr Wisse to engage the 'ALP GUARD', 'in order for tug to proceed to casualty site', and to inform the 'CARLO MAGNO' that it would be engaged once it arrived at the Suez Canal if the EVER GIVEN was still aground. He concluded, 'Reverting on offer shortly'. Mr Wisse said that SMIT would follow up with the two tugs accordingly.

44. At 06:06 UTC SMIT forwarded its latest proposal described at [15] and [16] above, including the detailed Wreckhire wording, to the defendants' solicitors 'in case not already received separately'.

45. At 07:46 UTC Captain Sen sent an email to Mr Isawa of Mitsui, stating that:

> 'Smit has given ultimatum that if we do not agree to the main terms of the offer they will start demobilisation. Please discuss with Owners and give me the go ahead to agree main terms of the Smit's commercial offer.'

46. This referred to something which had been said in a telephone conversation. The judge made no finding about the content of that conversation other than is recorded in this email. The conversation represents the first of three 'ultimatums' which Mr Parsons for the owners described as being at the heart of the appeal. He placed some emphasis on the reference to agreement on 'main terms'. However, as is apparent from the 'draft sent last night' (see at [16] above), the 'main terms' there referred to were not limited

to the remuneration to which SMIT would be entitled, but included all of the matters identified in the seven bullet points under the heading 'Commercial terms and conditions on daily hire basis'. There was, therefore, no indication at this stage that SMIT would be content with a binding contract dealing only with its remuneration, leaving other matters to be agreed at a later stage.

47. At 08:16 UTC Captain Sen sent the following message to Mr Wisse:

> 'We are pleased to confirm the below on behalf of the 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 25% of Gross invoice value to be increased to 35% if containers need to be offloaded to lighten the vessel for refloatation.
>
> We look forward to your confirmation/acceptance to the above. We can then start ironing out the wreck hire draft.'

48. In fact this message was sent in error as Captain Sen had misunderstood his instructions. On its face, however, it was a counter offer as to the remuneration terms of SMIT's offer, but did not address the other terms of that offer. Those were either ignored or were encompassed in what was left to be 'ironed out' when finalising the draft Wreckhire form. While the owners' counter as to the remuneration terms indicated that these represented a potential sticking point, the use of the words 'ironed out' implied at least that other matters were unlikely to be too controversial.

49. A few minutes later, however, at 08:20 UTC, Captain Sen cancelled this email, saying that there had been some confusion. He did not indicate the nature of that confusion, but it appears that he had misunderstood his instructions.

50. This was the situation when SMIT gave what Mr Parsons described as its second 'ultimatum', which was contained in an email from Mr Sheilds to Captain Sen at 08:43 UTC, following a telephone call between them. It stated:

> 'Thanks yours duly noted and shall be ignored.
>
> 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.'

51. So far, it had been SMIT's consistent position that (if the owners were not prepared to contract on LOF terms) it wanted a binding contract dealing comprehensively with all aspects of the services which it would provide. It had not suggested at any point that it would be content with a binding contract dealing only with its remuneration, leaving other matters for future agreement. I see nothing in this message to suggest any change in that position.

52. At 10:32 UTC, Captain Sen sent a further email to Mr Sheilds. This was in identical terms to the now-cancelled counter offer sent at 08:16 UTC (see at [47] above), save that it added a new term, arising out of the fact that it was known that a new attempt to refloat the vessel was about to be made, that:

> 'Refloatation Bonus to SMIT will be applicable if re-floatation attempt by SCA on 26 March 2021 is unsuccessful.'

53. Again Captain Sen asked for SMIT's 'confirmation / acceptance to the above', adding:

> 'We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest.'

54. Mr Janssen sent an email at 10:37 UTC (11:37 Dutch time) in the following terms:

> 'Please allow me to refer to the telephone conversation that you had with Jody this morning in which it was agreed that you would get back to us with a decision before 1100 hrs after which we would then repeat our position in a formal message. With that time having lapsed I checked with Jody and understand that you have just had a telcon with him which is why I would like to repeat our offer as submitted last night and make it clear that your recap as sent below is incorrect and not on the table as our offer of last night supersedes that. For the avoidance of doubt, specifically relating to the bonus arrangement, the percentage is 35% irrespective of the manner in which the vessel will be refloated. Alternatively we remain open LOF terms.
>
> 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 we may be left with little choice as relayed by Jody.
>
> Trust to have clarified sufficiently and we look forward to your earliest confirmation.'

55. The reference to being 'left with little choice' represents the third 'ultimatum' relied on by Mr Parsons. It appears that this message was sent in response to Captain Sen's email of 08:20 UTC (at [49] above) and that Mr Janssen had not yet read Captain Sen's further message sent at 10:32 UTC (although he had been copied on it). He responded to that message in an email sent a few minutes later, at 10:48 UTC:

> 'Thank you for your call just now and our messages just crossed indeed which is why the confirmation below is appreciated yet not entirely correct, particularly relating to item C the bonus arrangement.
>
> Our revised offer of last night clearly states 35% irrespective of the manner in which the vessel will be refloated. If you/ship's interest could revisit that in reconfirmation please then we shall be much obliged.
>
> Appreciate to hear shortly.'

56. A telephone conversation followed, as a result of which Captain Sen was able to send the email at 11:35 UTC which I have already set out at [11(1)] above. For convenience, I repeat it here:

> 'We refer to our telephone conversation subsequent to my previous email and my further conversation with Japan. As agreed over phone, I am pleased 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.'

57. These terms were the same as set out in Captain Sen's message of 10:32 UTC (see [52] above), with two changes. The first change (clause cii) was that the refloatation bonus would be 35% of the gross invoice value as insisted on by SMIT and not 25% as proposed by the owners. The second was a new term (clause ci), clarifying how the re-floatation bonus would be calculated.

58. Mr Janssen confirmed SMIT's agreement in his message sent only five minutes later, at 11:40 (see [11(2)] above):

> '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.'

59. As already explained, the owners' case is that it is at this stage that a binding contract as to the remuneration terms was concluded.

60. Captain Sen responded straight away with a promise to be in touch with Mr Sheilds and Mr Wisse on the contract wording. As the owners understood, SMIT's intention was that the contract would be signed by the end of the day. When nothing further had been heard by 17:56 UTC, SMIT sent a chasing message asking when the owners' detailed response could be expected, adding that 'We would obviously like to finalize this soonest'. Captain Sen responded at 18:02 UTC that 'There is nothing remarkably major to amend' and that he would revert as soon as possible. Mr Wisse thanked him for the swift response, saying that it was good to hear that no major issues existed.

61. In fact, internal correspondence between SKK (the ship's managers) and Mitsui Sumitomo Insurance Company Ltd, the owners' hull and machinery underwriters, indicates that at this stage they were prepared, now that the remuneration terms had been agreed, to agree to the remaining terms which SMIT had prepared in their entirety, but were unwilling to sign the contract until the following Monday. However, this was not communicated to SMIT.

62. The refloating attempt on 26th March was unsuccessful. This was a significant development. Previously, there had at least been the possibility that refloating the 'EVER GIVEN' without the assistance of the more powerful tugs which SMIT proposed to engage might be successful. From this point, however, that possibility must have appeared increasingly remote, meaning that (at any rate if no contract had been or were to be concluded) it was increasingly likely that SMIT's assistance would be needed for the ship to be refloated and that it would therefore be entitled to a salvage award.

Saturday 27th March 2021

63. In the event the further terms were not agreed. At 08:28 UTC on 27th March, Mitsui indicated for the first time that these might be a problem:

> 'We are working on the wording and come back to you via Capt Sen.
>
> As this incident has attracted attention of MSI's top management and may result in huge loss and cost, we must pay very careful consideration to the contract to obtain internal approval.
>
> As the next big meeting with the owner, to be joined by the owner's president will take place at 9.00 on Monday next week, we hope we will be able to agree to the final wording by then.'

Sunday 28th April 2021

64. In fact the owners did revert on 28th March 2021, proposing significant changes to the SMIT proposal of 25th March. These included changes as to the scope of services to be

provided, the standard of care which SMIT would be obliged to undertake, and the payment terms. Although further exchanges went back and forth, no further progress on the contract terms was made.

65. Meanwhile SMIT had continued in negotiations to fix the tugs 'ALP GUARD' and 'CARLO MAGNO', which were due to arrive on site early on 29th March.

Monday 29th March 2021

66. Those tugs did arrive and took part in the successful refloating of the 'EVER GIVEN' on 29th March.

The judgment

67. The judge's view was that throughout the parties' exchanges since early on 25th March 2021 and including the exchanges which were alleged to amount to the conclusion of a binding contract, the tenor of the communications was that the parties had reached agreement on the remuneration terms for a contract they were still negotiating, enabling them to move on to discuss and negotiate the detailed contract terms by which they were willing to be bound, but that no binding contract was concluded.

Submissions

68. For the owners, Mr Parsons submitted that the three ultimatums given by SMIT on the morning of 26th March 2021 were at the heart of the appeal. While a salvor may sometimes be prepared to proceed on speculation, SMIT's ultimatums made clear that it was not prepared to do so in this case, and in particular it was not prepared to incur the significant costs of hiring tugs to assist in the refloating operation. The ultimatums were given in response to requests by the owners for SMIT to engage tugs to provide assistance. But the owners were refusing to agree to SMIT's terms, leaving SMIT with the risk of incurring expenditure by hiring these tugs (which could not arrive for several days) with no assurance that it would be paid anything if the 'EVER GIVEN' was successfully refloated before they arrived. It was therefore necessary for SMIT to have a binding contract in place to avoid this happening: this was the 'assurance' on which SMIT was insisting, failing which it would cease its mobilisation efforts, and this was what it achieved by the exchange of emails on 26th March 2021 which amounted to the conclusion of a binding contract. A non-binding agreement on remuneration terms would provide no assurance at all. Once the emails were exchanged, however, the tenor of the parties' communications changed completely: there were no more ultimatums and the urgency had gone out of the situation, precisely because SMIT now had the assurance that it needed in order to go ahead, as it did. That change could only be explained by the parties' understanding that they had concluded a binding contract. If in fact no contract had been concluded, nothing had changed since the urgency of the morning.

69. Mr Jonathan Gaisman KC for SMIT submitted that in a case where there is no dispute as to the legal principle to be applied, the question whether a contract had been concluded depended on an evaluation of the parties' communications, in their context, and in a changing situation. This required an exercise of judgment by the trial judge with which this court should not interfere unless the judge's decision was plainly wrong or outside the bounds within which reasonable disagreement was possible.

70. That said, however, Mr Gaisman supported the judge's conclusion, making the following among other points:

(1) Salvors will often mobilise on speculation before any binding agreement for their services has been concluded. In the salvage context, therefore, the performance of services does not support an inference that a contract has been concluded.

(2) From as early as 12:03 UTC on 24th March 2021 (see at [30] above), SMIT put forward detailed terms dealing with all aspects of the services which it was prepared to provide if the owners insisted on a contract instead of the 'no cure-no pay' LOF terms which it would have preferred. In that respect SMIT's approach never altered. Any reference to 'main terms' was a reference to all of the terms included under that heading in its proposal of 21:40 UTC on 25th March (see at [16] above).

(3) The proposals which SMIT made, both at 12:03 UTC on 24th March 2021 (see at [30] above) and then at 21:40 UTC on 25th March (see at [16] above) were for a complete detailed contract, leaving nothing further to be agreed. This was not a case, therefore, where the parties reached an outline agreement on main terms, without even discussing the terms of a more detailed contract which was to follow.

(4) The parties' exchanges contemplated that, once agreement was reached on the remuneration terms, other matters would not be controversial and would fall into place very rapidly. That contemplation is demonstrated by Captain Sen's repeated references to 'ironing out' the terms of the draft Wreckhire contract, which could then be 'signed at the earliest' (see at [47], [53] and [56] above), by his assurance that there was 'nothing remarkably major to amend' (see at [60] above), and by the expectation that all the contract terms could be agreed on Friday 26th March (see also at [60] above) – as in fact they could have been (see at [61] above). As the judge found as a fact at [77]:

> 'It was reasonably to be contemplated that the detailed terms of any contract could be finalised promptly after the emails agreeing the remuneration terms'.

(5) Agreement on the remuneration terms was a critical step in the process of negotiating a contract, but that was all it was. The owners' initial failure to respond to SMIT's proposals, followed by their counter offer of a refloatation bonus of only 25% of the gross invoice value (see at [47] and [52] above), amounted to a roadblock which prevented further progress. Therefore the remuneration terms had to be agreed before any contract could be concluded. Such agreement was a necessary step on the way to a binding contract, but was never itself the destination towards which the parties were aiming.

(6) Agreement on the remuneration terms left basic issues unresolved. These included identification of the services which SMIT was to provide, the standard of care which it would be obliged to exercise, and the terms of payment. The alleged contract on which the owners rely did not oblige SMIT to do anything at all (see at [17] above). Just because it is legally possible to make a contract that 'if we provide services, this is what we will be paid' does not mean that the parties have done so. The skeletal nature of what was in fact agreed is highly relevant to the question whether the parties intended it to be a binding contract. Indeed, the nature of the services

and the remuneration to be paid for providing them are closely connected, as shown by the clarification that SMIT's first proposal did not extend to lightening the ship or dredging, for which a different remuneration package might be appropriate (see at [32] above).

(7) In circumstances where only the remuneration terms were agreed and the parties expected that agreement on the outstanding matters would be reached promptly and without difficulty, there was no need for an interim binding contract to be concluded by the exchange of emails on the morning of 26th March 2021. Such a contract would be pointless if the parties expected, as they did, to reach agreement on all other outstanding matters later that day. There was, moreover, little or no pressure on SMIT to conclude a binding interim contract. On the contrary, all the pressure was on the owners whose ship was blocking the Suez Canal: initial refloating attempts had proved unsuccessful; and with every hour that passed it became more and more likely that the owners would need SMIT's assistance to refloat the ship so that (if no contract was agreed) SMIT would in all likelihood be entitled to some form of salvage award.

(8) Finally, the ultimatums do not bear the weight attributed to them by the owners. They do not signal a radical change of approach by SMIT, which hitherto had been seeking agreement on all matters, with no suggestion that it was interested in a binding agreement on remuneration terms alone, leaving all other matters completely undefined.

Decision

71. The burden is on the owners to demonstrate that the parties' exchanges evince unequivocally an intention to be bound. In my judgment, and in agreement with the judge, they fall considerably short of doing so, for the reasons given by Mr Gaisman which I have summarised at [70] above. At the very least, those exchanges are consistent with the absence of an intention to be legally bound until all outstanding matters were agreed, which is not good enough for the owners' purposes.

72. I do not accept that this analysis is undermined by the terms or the context of the ultimatums relied on by Mr Parsons. The first ultimatum ('if we do not agree to the main terms of the offer they will start demobilisation': see at [45] above) is at least capable of referring to all of the matters referred to under the heading of 'Commercial terms and conditions on daily hire basis' in SMIT's proposal sent at 21:40 UTC on 25th March 2021 (see at [16] above). So too are the second ultimatum ('we need to have an agreement with Owners by 12:00 Dutch time today': see at [50] above) and the third ('failing the requested confirmation of either a commercial agreement or LOF': see at [54] above), which was promptly followed up by a request to agree to the entirety of 'Our revised offer of last night' (see at [55] above). At no stage did SMIT suggest, either unequivocally or at all, that it would be content with a binding contract dealing only with remuneration terms. That would have been a complete change of tack on its part. Although neither party used a term such as 'subject to contract' or 'subject details', it was not necessary to do so.

73. I accept that the urgency to conclude a contract which was demonstrated on the morning of 26th March 2021 did not continue at the same intensity after the parties reached agreement on the remuneration terms, although SMIT did continue to chase the owners.

However, once the refloating attempt on 26th March had failed, SMIT was in a strong commercial position. It was as urgent as ever to refloat the 'EVER GIVEN' without further delay and it was becoming increasingly apparent that SMIT was, in effect, the only realistic means by which this could be done. If the owners would not agree to SMIT's terms, it was increasingly likely that SMIT would at least be entitled to some form of salvage award. From SMIT's point of view, considering the matter objectively, that went a considerable way to defuse the urgency of concluding a contract and rendered its engagement of the tugs 'ALP GUARD' and 'CARLO MAGNO' less and less of a speculation. I would therefore reject the submission that the lack of urgency after the morning of 26th March reflected any understanding between the parties that a binding contract on remuneration terms had already been concluded.

74. Because I agree with the reasoning and conclusion of the judge that no binding contract was concluded, it is unnecessary to consider what standard of review this court should adopt on an appeal from a decision of this nature. I note, however, that the issue does not depend on oral evidence but on analysis of the parties' written exchanges, an exercise which this court is as well placed as the judge to undertake (cf. *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at [46] and [47]).

75. I would dismiss the appeal.

LORD JUSTICE POPPLEWELL:

76. I agree.

LADY JUSTICE KING:

77. I also agree.